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THE GENERAL STATUTES OF NORTH CAROLINA

1983 CUMULATIVE SUPPLEMENT

OCT 31 1983

Annotated, under the Supervision of the Department of
Justice, by the Editorial Staff of the Publishers

Under the Direction of

D. P. HARRIMAN, S. C. WILLARD, W. L. JACKSON
AND K. S. MAWYER

Volume 2C

1981 Replacement

Annotated through 303 S.E.2d 102. For complete scope of
annotations, see scope of volume page.

**Place with Corresponding Volume of Main Set. This
Supersedes Previous Supplement, Which May
Be Retained for Reference Purposes.**

THE MICHIE COMPANY
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Scope of Volume

Statutes:

Permanent portions of the general laws enacted by the General Assembly through the 1983 Regular Session and the 1983 Extra Session affecting Chapters 63 through 96 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

South Eastern Reporter 2nd Series through Volume 303, p. 102.

Federal Reporter 2nd Series through Volume 707, p. 523.

Bankruptcy Reports through Volume 29, p. 815.

Federal Supplement through Volume 562, p. 911.

Federal Rules Decisions through Volume 97, p. 544.

Supreme Court Reporter through Volume 103, p. 2468.

North Carolina Law Review through Volume 61, p. 744.

Wake Forest Law Review through Volume 19, p. 150.

Campbell Law Review through Volume 5, p. 262.

Duke Law Journal through 1983, p. 195.

North Carolina Central Law Journal through Volume 13, p. 282.

Opinions of the Attorney General.

Preface

This Supplement to Replacement Volume 2C contains the general laws of a permanent nature enacted by the General Assembly since publication of the replacement volume through the 1983 Regular Session and the 1983 Extra Session which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or The Michie Company, Law Publishers, Charlottesville, Virginia.

The General Statutes of North Carolina

1983 Cumulative Supplement

VOLUME 2C

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63-68. Limitations on State financial aid.

ARTICLE 1.

Municipal Airports.

§ 63-2. Cities and towns authorized to establish airports.

CASE NOTES

Cited in *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981).

§ 63-5. Airport declared public purpose; eminent domain.

CASE NOTES

Flights over Private Land as Taking. — Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

A compensable taking of a flight or aviation easement does not occur until overflights constitute a material interference with the use and enjoyment of property, such that there is substantial diminution in fair market value.

Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Inverse Condemnation Action for Frequent Overflights. — Failure to condemn directly under this section for damage to property caused by frequent overflights allows plaintiffs, if they wish compensation for the diminution in value of their properties, the sole alternative of an action for inverse condemnation. *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Judgments in Aviation Easement Cases. — Because the interest taken vests in the governmental entity, judgments in aviation easement cases should describe the easement acquired in terms of (1) frequency of flight, (2) permissible altitude, (3) type of aircraft, and (4)

duration. *Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E.2d 179 (1981), cert. denied, 304 N.C. 725, 288 S.E.2d 380 (1982).

Applied in *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982).

§ 63-6. Acquisition of sites; appropriation of moneys.

Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by Chapter 40A. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6; 1981, c. 919, s. 7.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, substituted "Chapter 40A" for "law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than

street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law" at the end of the first sentence.

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State Regulation.

§ 63-13. Lawfulness of flight.

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Proof of Adverse Use. — A use, to be adverse, must be over property as to which another possesses the right of lawful control. This section restricts the right of an owner to control the airspace over his property. Plaintiff, to establish adverse use, thus has the burden of proving that planes overflowed defendant's prop-

erty at such heights as to interfere with the then existing use of the land or airspace, or as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land. *City of Statesville v. Credit & Loan Co.*, 58 N.C. App. 727, 294 S.E.2d 405 (1982).

ARTICLE 4.

Model Airport Zoning Act.

§ 63-33. Procedure.

(a) **Adoption of Zoning Regulations.** — No airport zoning regulations shall be adopted, amended, or changed under this Article except by action of the legislative body of the political subdivision in question, or the joint board provided for in G.S. 63-31, subsection (c), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 10 days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(1941, c. 250, s. 5; 1981, c. 891, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

ment, effective Sept. 1, 1981, substituted "ten days" for "fifteen days" in the second sentence of subsection (a).

Effect of Amendments. — The 1981 amend-

ARTICLE 6.

Public Airports and Related Facilities.

§ 63-49. Municipalities may acquire airports.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the Chapter entitled Eminent Domain, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this Article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this State if such property is used in the business of such corporation.

(1945, c. 490, s. 2; c. 810; 1981, c. 919, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. —

As to eminent domain, see Chapter 40A.

Effect of Amendments. — The 1981 amend-

ment, effective Jan. 1, 1982, substituted "Chapter entitled Eminent Domain" for "law under which such municipality is authorized to acquire like property for public purposes" in the first sentence of subsection (b).

ARTICLE 7.

State and Federal Aid; Authority of Department of Transportation.

§ 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

- (2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of

supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using one hundred percent (100%) State funding in its discretion the Department of Transportation may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace and may conduct other projects or programs to improve the safety of the air transportation system, including but not limited to, making serviceable runways and taxiways. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.

- (3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source. The Department of Transportation may utilize the State Aviation Grant Funds to cover the direct costs, other than salaries, of administering airport grant projects and the full costs of services provided by non-administrative Department of Transportation divisions or other State agencies in connection with these projects.
- (5) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to eighty percent (80%) of the total cost of the development of new publicly owned airports identified in the North Carolina Airport System Plan, provided that such funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road. Any airport receiving Federal Airport Aid shall not be eligible for the foregoing eighty percent (80%) State funding, and, further, electronic navigational aids, terminal buildings, access taxiways, and other items eligible for State Airport Aid at the rate of fifty percent (50%) of the nonfederal share of project costs shall not be eligible for the foregoing eighty percent (80%) State funding, even though constructed as part of initial airport development. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2; 1983, c. 319.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted the language beginning "using one hundred percent (100%)" at the end of the first sentence of subdivision (2) for "using Department of Transportation personnel and one hundred percent (100%) State funding in its discretion, the Department of Transportation

may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace, mark serviceable runways and taxiways and correct minor safety deficiencies which are determined to be hazardous to the flying public," and added the second sentence in subdivision (3).

The 1983 amendment, effective May 17, 1983, added subdivision (5).

Chapter 65. Cemeteries.

Article 7A.

Sec.

Funeral and Burial Trust Funds.

transfers, assignments and terminations.

Sec.

65-36.7. Enforcement of Article.

65-36.1. Definitions.

Article 9.

65-36.2. Deposit of trust funds.

North Carolina Cemetery Act.

65-36.3. Refund of deposit.

65-36.5. Application for license.

65-53. Powers.

65-36.6. Licensee's books and records; notice of

ARTICLE 7A.

Funeral and Burial Trust Funds.

§ 65-36.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Commissioner" means the Commissioner of Banks of this State. (1969, c. 187, s. 1; 1983, c. 657, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective 30 days after ratification, rewrote subdivision (1), which read "'Department' means the State Banking Department." The act was ratified July 1, 1983.

§ 65-36.2. Deposit of trust funds.

(a) Except as provided in this section, all payments of money made to any person, partnership, association or corporation upon any agreement or contract, or any series of combination of agreements or contracts, but not including the furnishing of cemetery lots, crypts, niches, mausoleums, grave markers or monuments, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, are held to be trust funds. The person, partnership, association or corporation receiving the payments is declared to be a trustee thereof, and shall deposit all payments in a financial institution. All of the interest, dividends, increases or accretions of whatever nature earned by the funds deposited in a trust account shall remain with the principal of such account and become a part thereof, subject to all of the regulations concerning the principal of said fund herein contained. The trust fund itself shall be solely liable for all taxes on said fund and its interest, dividends, increases and accretions. The trustee may establish an individual trust for each contract or a common trust fund for all contracts. The trust accounts shall be carried in the name of the person, partnership, association or corporation to whom preneed payments are made, but accounting records shall be maintained showing the amounts deposited and invested, and interest, dividends, increases and accretions earned thereon, with respect to each purchaser's contract.

(a1) A funeral establishment licensed by the Commissioner may enter into an inflation-proof pre-need burial contract that establishes a fixed price for services and merchandise to be furnished at a future date regardless of changes

in the cost of services and merchandise to the licensed funeral establishment. A licensed funeral establishment that enters into an inflation-proof pre-need burial contract may retain ten percent (10%) of all payments on the contract upon filing with the Commissioner a bond in the amount retained. The bond shall be in a form and with such surety or sureties as may be required by the Commissioner, conditioned on compliance with G.S. 65-36.2(c1) and G.S. 65-36.3(b). In the event of noncompliance with G.S. 65-36.2(c1) the Commissioner shall disburse the proceeds of the bond in accordance with G.S. 65-36.2(c1), and in the event of noncompliance with G.S. 65-36.3(b) the Commissioner shall disburse the proceeds to the party who made the payments to the licensed funeral establishment. That portion of all payments on the contract not retained by the licensed funeral establishment shall be deposited in a trust fund as provided in subsection (a) of this section.

(b) All payments made under the agreement, contract or plan are and shall remain trust funds with the financial institution until the death of the person for whose service the funds were paid and until the delivery of all merchandise and full performance of all services called for by the agreement, contract or plan, except where payment is made pursuant to G.S. 65-36.3. The trust fund shall be established in an insured account in a financial institution and may be transferred from one approved financial institution to another.

(c) Upon the death of the beneficiary of a pre-need burial contract, the financial institution shall not pay funds it holds in trust under this section to the licensed funeral establishment until a certified statement is furnished to the financial institution that all terms and conditions of the contract have been fully performed by the licensed funeral establishment. Unless otherwise specified in the agreement, contract or plan, the said person, partnership, association or corporation shall have no obligation to deliver any merchandise or perform any services for which payment in full has not been deposited in the financial institution, and any amounts deposited which do not constitute payment in full shall be refunded to the estate of the deceased beneficiary of the plan or credited against the cost of merchandise or services contracted for by representatives of the deceased. Any balance remaining in the fund after payment for the merchandise and services as set forth in the agreement, contract or plan shall be paid to the estate of the beneficiary of the agreement, contract or plan.

(c1) In the event that a person, partnership, association, or corporation other than the contracting licensed funeral establishment to a pre-need burial contract provides the services, merchandise or personal property described in the contract for the beneficiary thereof, the funds deposited in a financial institution pursuant to G.S. 65-36.2(a) together with all interest, dividends, increases or accretions earned on such fund and any amount retained by the licensed funeral establishment pursuant to G.S. 65-36.2(b1) shall be paid to the provider of such services, merchandise or personal property upon submission to the financial institution and the licensed funeral establishment of a certified copy of the death certificate of the beneficiary and a certified copy of the charges for the services, merchandise or personal property provided for the deceased. Any balance remaining in the financial institution or retained by the licensed funeral establishment after payment to the provider shall be paid to the estate of the beneficiary of the contract. Upon making payment pursuant to this subsection and giving notice of payment to the licensed funeral establishment, the financial institution shall be relieved from all further liability. Upon making payment pursuant to this subsection, the licensed funeral establishment shall be relieved from all further liability. This subsection shall not apply if the pre-need contract provides that it is irrevocable.

(e) The Commissioner shall approve forms for pre-need burial contracts. All such contracts must be in writing, and no contract form shall be used without prior approval of the Commissioner. Any use or attempted use of an oral

pre-need burial contract or any written pre-need burial contract in a form not approved by the Commissioner shall be deemed to be a violation of this Article by the person selling services or merchandise thereunder. (1969, c. 187, s. 2; 1981 (Reg. Sess., 1982), c. 1336, s. 1; 1983, c. 657, ss. 2, 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the last two sentences of subsection (a). Session Laws 1981 (Reg. Sess., 1982), c. 1336, s. 3, provides: "This act is effective upon ratification [June 23, 1982] and applies to contracts entered into on and after that date."

The 1983 amendment, effective 30 days after ratification, inserted "Except as provided in this section" at the beginning of subsection (a), inserted subsection (a1), added the second sentence of subsection (b), rewrote the first sentence of subsection (c), and inserted subsection (c1). The amendment also substituted reference to the Commissioner for reference to the State Banking Department in subsection (e). The act was ratified July 1, 1983.

§ 65-36.3. Refund of deposit.

(a) Within 30 days of receipt of a written demand for refund by any party who has paid funds under a pre-need burial contract, the financial institution with which such funds have been deposited shall refund to such party the entire amount deposited with the financial institution together with all interest, dividends, increases, or accretions earned on such fund.

(b) Within 30 days of receipt of a written demand for refund by any party who has paid funds under a pre-need burial contract, the licensed funeral establishment that has retained any portion of the payments pursuant to G.S. 65-36.2(a1) shall refund to such party the entire principal amount retained by the licensed funeral establishment without any interest, dividends, increases or accretions earned on such fund.

(c) After making refund pursuant to this section and giving notice of the refund to the contracting licensed funeral establishment, the financial institution shall be relieved from all further liability. After making refund pursuant to this section, the licensed funeral establishment shall be relieved from all further liability.

(d) This section shall not apply if the pre-need burial contract provides that it is irrevocable. (1969, c. 187, s. 3; 1981 (Reg. Sess., 1982), c. 1336, s. 2; 1983, c. 657, s. 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment added the second sentence of the second paragraph of this section as it read prior to the 1983 amendment. Session Laws 1981 (Reg. Sess., 1982), c. 1336, s. 3, provides: "This act is effective upon ratification

[June 23, 1982] and applies to contracts entered into on and after that date."

The 1983 amendment, effective 30 days after ratification, rewrote this section. The act was ratified July 1, 1983.

§ 65-36.5. Application for license.

(a) No person, firm, partnership, association or corporation may, without first securing from the Commissioner a license, accept and/or hold payments made on preneed burial contracts, except financial institutions as defined in G.S. 65-36.1(2) hereof. Application for a license shall be in writing, signed by the applicant and duly verified on forms furnished by the Commissioner. Each application shall contain at least the following: the full names and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for the applicant or at a new address approved by the Commissioner.

(b) Each application for a license shall be accompanied by a nonrefundable investigation fee of twenty-five dollars (\$25.00). If the license is granted, the investigation fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the investigation fee, the Commissioner shall issue a renewable license unless it determines that the applicant has made false statements or representations in the application, or is insolvent, or has conducted, or is about to conduct, his business in a fraudulent manner, or is not duly authorized to transact business in this State. Each licensee under this Article shall pay annually to the Commissioner on or before June 30 of each year, a license fee of twenty-five dollars (\$25.00).

(c) Any person selling a preneed funeral service contract shall collect from each purchaser a service charge of ten dollars (\$10.00), and all of which fees so collected shall be remitted by the person collecting same to the Commissioner at least once each month, and such funds shall be used by the Commissioner in administering this Article. (1969, c. 187, s. 5; 1981, c. 671, ss. 16, 17; 1983, c. 657, s. 4.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the first, second and fourth sentences of subsection (b) and, in the third sentence of subsection (b), substituted "the investigation fee" for "a license fee of twenty-five dollars (\$25.00)" and inserted "renewable" preceding "license" near the beginning of the sentence. In subsection (c), the

amendment substituted "ten dollars (\$10.00)" for "two dollars (\$2.00)."

The 1983 amendment, effective 30 days after ratification, substituted reference to the Commissioner for reference to the State Banking Department in this section. The act was ratified July 1, 1983.

§ 65-36.6. Licensee's books and records; notice of transfers, assignments and terminations.

(a) The licensee shall keep accurate accounts, books, and records in this State of all transactions, copies of all agreements, dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit funds are accepted, and the names of the depositories of the funds. The licensee shall make all books and records pertaining to the trust funds available to the Commissioner for examination. The Commissioner may at any time investigate the books, records, and accounts of the licensee with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony it may require.

(b) Before any trust funds may be transferred to a financial institution that is not a party to a pre-need burial contract, the licensee shall notify the Commissioner of the name and address of the intended transferee financial institution; and before the transfer may be made, the transferee financial institution shall agree to make the disclosure required under the pre-need burial contract to the Commissioner or his designated examiner. If the contract is revocable, the licensee shall notify the contracting party of the intended transfer.

(c) In the event that any licensee should transfer or assign its assets or stock to a successor funeral establishment or terminate its business as a funeral establishment, the licensee shall notify the Commissioner within 15 days after the effective date of said transfer, assignment or terminations. (1969, c. 187, s. 6; 1983, c. 657, ss. 4, 5.)

Effect of Amendments. — The 1983 amendment, effective 30 days after ratification, designated the first paragraph as subsection (a) and added subsections (b) and (c). In addition, in

subsection (a) the amendment substituted reference to the Commissioner for reference to the State Banking Department. The act was ratified July 1, 1983.

§ 65-36.7. Enforcement of Article.

The Commissioner shall enforce the provisions of this Article and has the power to make investigations, subpoena witnesses, require audits and reports and conduct hearings as to violations of any provisions, and to establish such rules and regulations as are necessary to carry out the provisions of this Article. (1969, c. 187, s. 7; 1983, c. 657, s. 4.)

Effect of Amendments. — The 1983 amendment, effective 30 days after ratification, substituted reference to the Commissioner for

reference to the State Banking Department in this section. The act was ratified July 1, 1983.

ARTICLE 9.

North Carolina Cemetery Act.

§ 65-53. Powers.

In addition to other powers conferred by this Article, the Cemetery Commission shall have the following powers and duties:

- (1) The administrator shall be appointed by the Governor upon recommendation of the Cemetery Commission. The compensation of the administrator and such other personnel as is necessary to operate the Commission is subject to the provisions of Chapter 126 of the General Statutes of North Carolina.

(1943, c. 644, s. 17; c. 1149, s. 8; 1973, c. 732, s. 2; 1975, c. 768, s. 1; 1977, c. 686, ss. 4-6; 1979, c. 888, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1153.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment

rewrote the second sentence of subdivision (1), which formerly read: "The Cemetery Commission shall set the compensation of the administrator and such other personnel as are necessary to operate the Commission."

Chapter 66.

Commerce and Business.

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66-173. Portable smelters prohibited.

ARTICLE 5.

*Sale of Phonograph Records or Electrical Transcriptions.***§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.**

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

ARTICLE 9B.

Motor Clubs and Associations.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 66-49.9. Definitions.

As used in this Article, unless the context otherwise requires, the term:

- (5) "Emergency road service" shall mean roadside adjustment of a motor vehicle so that such vehicle may be operated under its own power, provided the cost of rendering such service does not exceed fifty dollars (\$50.00).

(1963, c. 698; 1983, c. 542.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective Jan. 1, 1984, substituted "fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)" at the end of subdivision (5).

§ 66-49.11. Applications for licenses; fees; bonds or deposits.

Licenses hereunder shall be obtained by filing written application therefor with the Commissioner in such form and manner as the Commissioner shall require. As a prerequisite to issuance of a license:

- (2) If the applicant is a motor club it shall be required to pay to the Commissioner an annual license fee of two hundred dollars (\$200.00) and to deposit or file with the Commissioner a bond, in favor of the State of North Carolina and executed by a surety company duly authorized to transact business in this State, in the amount of fifty thousand dollars (\$50,000), or securities of the type hereinafter specified in the amount of fifty thousand dollars (\$50,000), pledged to or made payable to the State of North Carolina and conditioned upon the full compliance by the applicant with the provisions of this Article and the regulations and orders issued by the Commissioner pursuant thereto, and upon the good faith performance by the applicant of its contracts for motor club services.

- (3) If the applicant is a branch or district office of a motor club licensed under this Article it shall pay to the Commissioner a license fee of twenty dollars (\$20.00).
- (4) If the applicant is a franchise motor club it shall pay to the Commissioner an annual license fee of fifty dollars (\$50.00) and shall deposit or file with the Commissioner a bond, in favor of the State of North Carolina and executed by a surety company duly authorized to transact business in this State, in the amount of fifty thousand dollars (\$50,000), or securities of the type hereinafter specified in the amount of fifty thousand dollars (\$50,000), pledged to or made payable to the State of North Carolina and conditioned upon the full compliance by the applicant with the provisions of this Article and the regulations and orders issued by the Commissioner pursuant thereto and upon the good faith performance by the applicant of its contracts for motor club services.

(1963, c. 698; 1983, c. 790, ss. 7-9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, substituted "two hundred dollars (\$200.000)" for "one hundred

dollars (\$100.00)" in subdivision (2), substituted "twenty dollars (\$20.00)" for "ten dollars (\$10.00)" in subdivision (3), and substituted "fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)" in subdivision (4).

§ 66-49.18. Insurance licensing provisions not affected.

Nothing in this Article shall be construed as amending, repealing, or in any way affecting any laws now in force relating to the licensing of Motor Club Membership Sales Agents or to the licensing or regulation of insurance agents and insurance companies, as provided in Chapter 58 of the General Statutes. (1963, c. 698; 1983, c. 802, s. 3.)

Effect of Amendments. — The 1983 amendment, effective July 18, 1983, inserted "Motor Club Membership Sales Agents or to the licensing or regulation of" preceding "insurance

agents," substituted "and" for "or" thereafter, and deleted "or to the regulation thereof" following "insurance companies."

ARTICLE 9C.

Collection Agencies.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

Part 1. Permit Procedures.

§ 66-49.31. Application fee; issuance of permit; contents and duration.

Upon the filing of the application and information hereinbefore required, the Commissioner may require the applicant to pay a fee of five hundred dollars (\$500.00), and no permit may be issued until this fee is paid. If the application

is denied, the Commissioner shall retain fifty dollars (\$50.00) of the application fee and return the remainder to the applicant. The fifty dollars (\$50.00) so retained upon applications not granted, and the full fee of five hundred dollars (\$500.00) upon the applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits.

Each permit shall state the name of the applicant, his place of business, and the nature and kind of business in which he is engaged. The Commissioner shall assign to the permit a serial number for each year, and each permit shall be for a period of one year, beginning with July 1 and ending with June 30 of the following year. (1931, c. 217, s. 4; 1979, c. 835; 1983, c. 790, s. 10.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, substituted "five hundred dollars (\$500.00)" for "two hundred

fifty dollars (\$250.00)" in the first and third sentences of the first paragraph.

Part 3. Prohibited Practices by Collection Agencies Engaged in the Collection of Debts from Consumers.

§ 66-49.43. Threats and coercion.

Legal Periodicals. — For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

ARTICLE 10A.

Inventions Developed by Employee.

§ 66-57.1. Employee's right to certain inventions.

Any provision in an employment agreement which provides that the employee shall assign or offer to assign any of his rights in an invention to his employer shall not apply to an invention that the employee developed entirely on his own time without using the employer's equipment, supplies, facility or trade secret information except for those inventions that (i) relate to the employer's business or actual or demonstrably anticipated research or development, or (ii) result from any work performed by the employee for the employer. To the extent a provision in an employment agreement purports to apply to the type of invention described, it is against the public policy of this State and is unenforceable. The employee shall bear the burden of proof in establishing that his invention qualifies under this section. (1981, c. 488, s. 1.)

Cross References. — As to larceny of secret technical processes, see § 14-75.1.

§ 66-57.2. Employer's rights.

An employer may not require a provision of an employment agreement made unenforceable under G.S. 66-57.1 as a condition of employment or continued employment. An employer, in an employment agreement, may require that the employee report all inventions developed by the employee, solely or jointly, during the term of his employment to the employer, including those asserted by the employee as nonassignable, for the purpose of determining employee or

employer rights. If required by a contract between the employer and the United States or its agencies, the employer may require that full title to certain patents and inventions be in the United States. (1981, c. 488, s. 1.)

ARTICLE 11.

Government in Business.

§ 66-58. Sale of merchandise by governmental units.

- (b) The provisions of subsection (a) of this section shall not apply to:
- (1) Counties and municipalities.
 - (2) The Department of Human Resources or the Department of Agriculture for the sale of serums, vaccines, and other like products.
 - (3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.
 - (4) The State hospitals for the insane.
 - (5) The Department of Human Resources.
 - (6) The North Carolina School for the Blind at Raleigh.
 - (7) The North Carolina Schools for the Deaf.
 - (8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
 - (9) The Department of Natural Resources and Community Development, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.
 - (10) Child-caring institutions or orphanages receiving State aid.
 - (11) Highlands School in Macon County.
 - (12) The North Carolina State Fair.
 - (13) Rural electric memberships corporations.
 - (13a) State Farm Operations Commission.
 - (13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.
 - (13c) The Western North Carolina Agricultural Center.
 - (14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the

State of North Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

- (15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the state Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

- (16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for the Governor Morehead School and the North Carolina School for the Deaf.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

- (c) The provisions of subsection (a) shall not prohibit:

- (1) The sale of products of experiment stations or test farms.
- (2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.
- (3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of such stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students and their immediate families, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring

the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

- (4) The operation of lunch counters by the Department of Human Resources as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.
- (5) The operation of a snack bar and cafeteria in the State Legislative Building.
- (6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.
- (7) The operation by penal, correctional or institutions for the care of the blind, or mentally or physically defective or by the State Department of Agriculture, of dining rooms for the inmates or patients or members of the staff while on duty and for the accommodation of persons visiting such inmates or patients, and other bona fide visitors.
- (8) The sale by the Department of Agriculture of livestock, poultry and publications in keeping with its present livestock and farm program.
- (9) The operation by the public schools of school cafeterias.
- (10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.
- (11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.
- (12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.
- (13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of such management program.
- (14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.
- (15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Sessions Laws 1983, c. 761, s. 259, is a severability clause.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Schools" for "School" in subdivision (b)(7) and deleted "at Morgantown" at the end of that subdivision.

Session Laws 1983, c. 8, effective February 11, 1983, rewrote subdivision (5) of subsection (c), which formerly read "The operation of concession stands in the State Capitol during the sessions of the legislature."

Session Laws 1983, c. 476, effective June 9, 1983, added subdivision (13c) to subsection (b).

Session Laws 1983, c. 717, s. 13, effective July 11, 1983, substituted "Governor" for "Advisory Budget Commission" in the first sentence of subsection (f) and substituted "Director of the Budget" for "Advisory Budget Commission" at the end of the second sentence of subsection (f).

Session Laws 1983, c. 761, s. 168, effective July 15, 1983, added the second sentence of the first paragraph of subdivision (b)(16).

Legal Periodicals. — For a note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

CASE NOTES

Enforcement of Section. — Governmental units created by the state have no duty or authority to attempt to enforce the provisions of

this section by ad valorem taxation of state property. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

ARTICLE 16.

Unfair Trade Practices in Diamond Industry.

§ 66-73. Definitions.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-74. What constitutes unfair trade practice.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 66-75. Penalty for violation; each practice a separate offense.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

ARTICLE 17.

Closing-Out Sales.

§ 66-76. Definitions.

For the purposes of this Article, "closing-out sale" shall mean and include all sales advertised, represented or held forth under the designation of "going out of business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," or any other designation of like meaning; "distress sale" shall mean and include all sales in which it is represented or implied that going out of business is possible or anticipated, in which closing out is referred to in any way, or in which it is implied that

business conditions are so difficult that the seller is forced to conduct the sale; and "person" shall mean and include individuals, partnerships, voluntary associations and corporations. (1957, c. 1058, s. 1; 1981, c. 633, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the definition of a distress sale.

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

(a) No person shall advertise or offer for sale a stock of goods, wares or merchandise under the description of closing-out sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, or a distress sale unless he shall have obtained a license to conduct such sale from the clerk of the city or town in which he proposes to conduct such a sale or from the officer designated by the Board of County Commissioners if the sale is conducted in an unincorporated area. The applicant for such a license shall make to such clerk an application therefor, in writing and under oath at least seven days prior to the opening date of sale, showing all the facts relating to the reasons and character of such sale, including the opening and terminating dates of the proposed sale, a complete inventory of the goods, wares or merchandise actually on hand in the place whereat such sale is to be conducted, and all details necessary to locate exactly and identify fully the goods, wares or merchandise to be sold. Provided, the seller in a distress sale need not file an inventory.

(b) If such clerk shall be satisfied from said application that the proposed sale is of the character which the applicant desires to advertise and conduct, the clerk shall issue a license, upon the payment of a fee of fifty dollars (\$50.00) therefor, together with a bond, payable to the city or town or county in the penal sum of five hundred dollars (\$500.00), conditioned upon compliance with this Article, to the applicant authorizing him to advertise and conduct a sale of the particular kind mentioned in the application; provided, however, that the license fee provided for herein shall be good for a period of 30 days from its date, and if the applicant shall not complete said sale within said 30-day period then the applicant shall make application to such clerk for a license for a new permit, which shall be good for an additional period of 30 days, and shall pay therefor the sum of fifty dollars (\$50.00); and provided further a second extension period of 30 days may be similarly applied for and granted by the clerk upon payment of an additional fee of fifty dollars (\$50.00) and upon the clerk being satisfied that the applicant is holding a bona fide sale of the kind contemplated by this Article and is acting in a bona fide manner. No additional bond shall be required in the event of one or more extensions as herein provided for. Any merchant who shall have been conducting a business in the same location where the sale is to be held for a period of not less than one year, prior to the date of holding such sale, or any merchant who shall have been conducting a business in one location for such period but who shall, by reason of the building being untenable or by reason of the fact that said merchant shall have no existing lease or ownership of the building and shall be forced to hold such sale at another location, shall be exempted from the payment of the fees and the filing of the bond herein provided for.

(c) Every city or town or county to whom application is made shall endorse upon such application the date of its filing, and shall preserve the same as a record of his office, and shall make an abstract of the facts set forth in such application, and shall indicate whether the license was granted or refused.

(d) Any person making a false statement in the application provided for in this section shall, upon conviction, be deemed guilty of perjury. (1957, c. 1058, s. 2; 1981, c. 633, ss. 2-4.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a distress sale" in the first sentence of subsection (a), added the language beginning "or from the officer" at the end of that sentence, added the proviso at the end of subsection (a), substituted

"fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)" following "payment of a fee of" in the first sentence of subsection (b), inserted "or county" in that sentence, and inserted "or county" in subsection (c).

§ 66-78. Additions to stock in contemplation of sale prohibited.

No person in contemplation of a closing-out sale shall order any goods, wares or merchandise for the purpose of selling and disposing of the same at such sale, and any unusual purchase and additions to the stock of such goods, wares or merchandise within 60 days prior to the filing of application for a license to conduct such sale shall be presumptive evidence that such purchases and additions to stock were made in contemplation of such sale. (1957, c. 1058, s. 3; 1981, c. 633, s. 5.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "under a

license as provided for in G.S. 66-77" following "closing-out sale."

§ 66-79. Replenishment of stock prohibited.

No person carrying on or conducting a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, shall, during the continuance of such sale, add any goods, wares or merchandise to the damaged stock inventoried in his original application for such license, and no good, wares or merchandise shall be sold as damaged merchandise at or during such sale, excepting the goods, wares or merchandise described and inventoried in such original application. (1957, c. 1058, s. 4; 1981, c. 633, s. 5.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "under a

license as provided in G.S. 66-79" following "water or otherwise,".

§ 66-80. Continuation of sale or business beyond termination date.

No person shall conduct a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale beyond the termination date specified for such sale, except as otherwise provided for in subsection (b) of G.S. 66-77; nor shall any person, upon conclusion of such sale, continue that business which had been represented as closing out or going out of business under the same name, or under a different name, at the same location, or elsewhere in the same city or town where the inventory for such sale was filed; nor shall any person, upon conclusion of such sale, continue business contrary to the designation of such sale. (1957, c. 1058, s. 5; 1981, c. 633, s. 6.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a

distress sale" near the beginning of the section.

§ 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be fined or imprisoned, or both, in the discretion of the court. (1957, c. 1058, s. 6; 1981, c. 633, s. 7.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a distress sale" near the middle of the section.

§ 66-84: Repealed by Session Laws 1981, c. 633, s. 8, effective July 1, 1981.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

For purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services for the purpose of enabling the purchaser to start a business, and in which the seller represents:

- (1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises neither owned nor leased by the purchaser or seller; or
- (2) That it may, in the ordinary course of business, purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part the supplies, services or chattels sold to the purchaser; or
- (3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or
- (4) That it will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a federally registered trademark or a federally registered service mark, or when the purchaser pays less than one hundred dollars (\$100.00).

Provided, that "business opportunity" does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-profit sale of sales demonstration equipment, materials, or samples, for a total price of two hundred dollars (\$200.00) or less. (1977, c. 884, s. 1; 1981, c. 817, s. 1; 1983, c. 421, s. 2.)

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, deleted "which are sold to the purchaser" following "supplies or services" in the introductory clause, inserted "neither" near the end of subdivision (1), substituted "may, in the ordinary course of business," for "will" in subdivision (2), and, in subdivision (4), substituted "it" for "upon payment by the purchaser of a fee or sum of money which exceeds fifty dollars (\$50.00) to the seller, the seller," inserted "federally" preceding "registered trademark," inserted "a federally registered" preceding "service mark," and added the language beginning with "or when the purchaser" at the end of the subdivision. Session Laws 1981, c. 817, s. 5 provides:

"This act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a)."

The 1983 amendment, effective June 2, 1983, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" at the end of subdivision (4) and substituted "two hundred dollars (\$200.00)" for "one hundred dollars (\$100.00)" near the end of the last paragraph.

Legal Periodicals. —

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Precontract Dealings Regulated. — This section is not confined to regulating the behavior of the seller at the time the contract of sale is signed, but seeks to regulate precontract dealings as well. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

When seller guaranteed income from a

franchise, it came within statute's scope and had to comply with the act in its dealings with purchaser. Seller could not then remove the sale of the franchise from the act's requirements by later disclaiming any guarantee of profit. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-94.1. Responsible sellers exemption.

(a) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies or services where:

- (1) The seller has not derived net income from such sales within the State during either of its two previous fiscal years, and does not intend to derive net income from such sales during its current fiscal year; and
- (2) The primary commercial activity of the seller or its affiliate is substantially different from the sale of the goods or services to the purchaser, and the gross revenues received by the seller from all such sales during the current and each of the two previous fiscal years do not exceed ten percent (10%) of the total gross revenues from all operations for the same period of the seller and any other affiliated entity contractually obligated to compensate the purchaser for the purchaser's business activities arising from the sale; and
- (3) The sale results in an improvement to realty owned or leased by the purchaser which enables the purchaser to receive goods on consignment from the seller or its affiliate. An "improvement to realty" occurs when a building or other structure is constructed or when significant improvements to an existing building or structure are made; and
- (4) The seller has either a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars (\$5,000,000) or has obtained a surety bond from a surety company authorized to do business in this State in an amount equal to or greater than the gross revenues received from the sale or lease of products, equipment, supplies or services in this State during the preceding 12-month period which enabled the purchaser to start a business.

(b) Any seller satisfying the requirements of subsection (a) shall file with the Secretary of State two copies of a document signed under oath by the seller

or one authorized to sign on behalf of the seller containing the following information:

- (1) The name of the seller and whether the seller is doing business as an individual, partnership or corporation;
- (2) The principal business address of the seller;
- (3) A brief description of the products, equipment, supplies or services being sold or leased by the seller; and
- (4) A statement which explains the manner in which each of the requirements of subsection (a) are met. (1983, c. 421, s. 1.)

Editor's Note. — Session Laws 1983, c. 421, s. 3, makes this section effective June 2, 1983.

§ 66-95. Required disclosure statement.

At least 48 hours prior to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any business opportunity. The information contained in this disclosure has not been verified by the State. If you have any questions about this investment, see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

- (2) The names and addresses and titles of the seller's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the seller's business activities relating to the sale of business opportunities. The disclosure document shall additionally contain a statement disclosing who, if any, of the above persons:
 - a. Has been the subject of any legal or administrative proceeding alleging the violation of any business opportunity or franchise law, or fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations;
 - b. Has been the subject of any bankruptcy, reorganization or receivership proceeding, or was an owner, a principal officer or a general partner of any entity which has been subject to such proceeding.

The disclosure document shall set forth the name of the person, the nature of and the parties to the action or proceeding, the court or other forum, the date, the current status of the action or proceeding, the terms and conditions of any order of decree, the penalties or damages assessed and/or terms of settlement, and any other information to enable the purchaser to assess the prior business activities of the seller.

- (3) The prior business experience of the seller relating to business opportunities including:
 - a. The name, address, and a description of any business opportunity previously offered by the seller;
 - b. The length of time the seller has offered each such business opportunity;

c. The length of time the seller has conducted the business opportunity currently being offered to the purchaser.

(1977, c. 884, s. 1; 1981, c. 817, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, substituted "and" for a comma preceding "addresses" in the first sentence of subdivision (2), added all of the language in subdivision (2) following the first

sentence, and rewrote subdivision (3). Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a)."

CASE NOTES

Purchaser's Remedies For Failure to Make Disclosures. — Where seller failed to make the disclosures required under this section, purchaser was entitled under § 66-100(a)

to void the contract and receive all sums paid to seller. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-96. Bond or trust account required.

CASE NOTES

Stated in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of ten dollars (\$10.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) The Secretary of State may accept the Uniform Franchise Offering Circular (UFOC) or the Federal Trade Commission Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.

(e) Failure to so file shall be a misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3.)

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, substituted "two copies" for "a copy" and added "accompanied by a fee in the amount of ten dollars (\$10.00) made payable to the Secretary of State," in the first sentence of subsection (a), substituted "The seller" for "and" at the beginning of the second sentence of subsection (a), deleted the former second sentence of subsection (a), which was substantially identical to

present subsection (c), and added subsections (b), (c) and (d) and redesignated former subsection (b) as subsection (e).

Session Laws 1981, c. 817, s. 5 provides: "This act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a)."

§ 66-98. Prohibited acts.

CASE NOTES

Stated in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

§ 66-99. Contracts to be in writing; form; provisions.

- (b) Every contract for a business opportunity shall include the following:
- (1) The terms and conditions of payment;
 - (2) A full and detailed description of the acts or services that the business opportunity seller undertakes to perform for the purchaser;
 - (3) The seller's principal business address and the name and address of its agent in the State of North Carolina authorized to receive service of process in addition to the Secretary of State as provided in G.S. 66-97(b);
 - (4) The approximate delivery date of any product(s), equipment or supplies the business opportunity seller is to deliver to the purchaser. (1977, c. 884, s. 1; 1981, c. 817, s. 4; 1983, c. 721, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to contracts requiring writing, see §§ 22-1 through 22-4.

Effect of Amendments. — The 1981 amendment, effective September 1, 1981, inserted "in addition to the Secretary of State as provided in G.S. 66-95(b)" at the end of subdivision (b)(3). Session Laws 1981, c. 817, s. 5 provides: "This

act shall become effective September 1, 1981, provided that sellers who have filed disclosure documents before September 1, 1981, need not incorporate the changes required by this act until they next update their disclosure document as required by G.S. 66-97(a)."

The 1983 amendment, effective July 11, 1983, substituted "G.S. 66-97(b)" for "G.S. 66-95(b)" at the end of subdivision (b)(3).

§ 66-100. Remedies.

CASE NOTES

Where seller failed to make the disclosures required under § 66-95 to purchaser, purchaser was entitled under subsection (a) of this section to void the contract and receive all

sums paid to seller. *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980).

Cited in *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

ARTICLE 20.

Loan Brokers.

§ 66-106. Definitions.

For purposes of this Article the following definitions apply:

- (1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.
- (2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, a lease or otherwise.

Provided, that this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars (\$1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1.)

Effect of Amendments. — The 1981 amendment, added the language beginning "nor to

any insurance company" at the end of the first proviso and added the second proviso.

§ 66-109. Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(1979, c. 705, s. 1; 1981, c. 785, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "two copies" for "a copy" in the first sentence of subsection (a).

§ 66-111. Remedies.

CASE NOTES

Cited in *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

ARTICLE 21.

Prepaid Entertainment Contracts.

§ 66-125. Remedies.

CASE NOTES

Cited in *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

§§ 66-126 to 66-130: Reserved for future codification purposes.

ARTICLE 22.

Discount Buying Clubs.

§ 66-131. Definition.

For the purpose of this Article, a "discount buying club" is any person, firm or corporation, which in exchange for any valuable consideration offers to sell or to arrange the sale of goods or services to its customers at prices represented to be lower than are generally available. "Discount buying club" shall not include any cooperative buying association or other group in which no person is intended to profit or actually profits beyond the benefit that all members receive from buying at a discount; nor shall any person, firm or corporation be deemed "a discount buying club" solely by virtue of the fact that (i) for fifty dollars (\$50.00) or less it sells tickets or coupons valid for use in obtaining goods or services from a retail merchant, or (ii) as a service collateral to its principal business, and for no additional charge it arranges for its members or customers to purchase or lease directly from particular merchants at a specified discount. (1981, c. 594, s. 1.)

Editor's Note. — Session Laws 1981, c. 594, s. 2, makes this Article effective July 1, 1981.

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

§ 66-132. Contracts to be in writing.

Every contract between a discount buying club and its customers shall be in writing, fully completed, dated and signed by all contracting parties. A copy of the completed contract shall be given to the buyer at the time he signs it. The contract shall in clear, conspicuous and simple language:

- (1) State the duration of the contract in a definite period of years or months. If the contract calls for periodic renewal fees, the amount of such fees must be stated.
- (2) State that the buying club will maintain a trust account and bond in compliance with G.S. 66-135, and identify the location of the trust account and the name and address of the surety company.
- (3) Contain, immediately above the customer's signature in boldface type of not less than 10 points size, a statement substantially as follows: "You, the customer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. To cancel you must notify the company in writing of your intent to cancel."
- (4) List the categories of goods and services the buying club contracts to make available.
- (5) State the procedures by which the customer can select, order, and pay for merchandise or services and state the time and manner of delivery.
- (6) State the method the discount buying club will use in setting the price customers will pay for goods or services.
- (7) List any charges, however denominated, which are incidental to the purchase of goods or services and which must be paid by the customer.
- (8) State the discount buying club's obligations with respect to warranties on goods or services ordered.
- (9) State the customer's rights and obligations with respect to the cancellation or return of ordered goods. (1981, c. 594, s. 1.)

Cross References. — As to contracts requiring writing, see §§ 22-1 through 22-4.

§ 66-133. Customer's right to cancel.

(a) In addition to any other right to revoke an offer or cancel a sale or contract, the customer has the right to cancel a contract for the services of a discount buying club until midnight of the third business day after the buyer signs a contract which complies with G.S. 66-132.

(b) Cancellation occurs when the customer gives written notice of cancellation to the discount buying club at the address stated in the contract.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed with postage prepaid.

(d) Notice of cancellation need not take any particular form and is sufficient if it indicates by any form of written expression that the customer intends or wishes not to be bound by the contract.

(e) For purposes of this Article, business days are all days other than Saturdays, Sundays, holidays, and days on which the discount buying club is not open for business. (1981, c. 594, s. 1.)

§ 66-134. Prohibited acts.

Discount buying clubs shall not:

- (1) Represent to any potential customer that his opportunity to join is limited in time or that his delay in joining may subject him to an increased price. This shall not preclude reference to a general price increase that will take effect on a specified date.

- (2) Discourage or refuse to allow potential customers to inspect all of their current merchandise catalogs and price lists during normal business hours at their place of business.
- (3) Compare their prices for goods or services with other prices unless the comparison prices are prices at which substantial sales of the same goods or services were made in the same area within the past 90 days, and unless a written copy of the comparison is given to the buyer to keep.
- (4) Fail upon the customer's request to cancel without charge any purchase order for:
 - a. Services, if such services have not been substantially performed;
 - b. Goods to be specially manufactured, if such manufacture has not been substantially performed; or
 - c. Any other goods, if they have not been delivered to the customer or consigned to a certified public carrier for delivery;within 90 days after the purchase order was received by the buying club. This provision shall not be construed to limit a customer's right to earlier performance created by contract or by any other applicable law or regulation.
- (5) Charge any amount in excess of demonstrable actual damages upon a customer's cancellation of an order. (1981, c. 594, s. 1.)

§ 66-135. Bond and trust account required.

(a) Every discount buying club shall obtain and maintain a bond from a surety company licensed to do business in North Carolina. Such bond shall be in an amount not less than twenty-five thousand dollars (\$25,000). Whenever a discount buying club has contracts with North Carolina residents, from whom it has received contract payments of fifty thousand dollars (\$50,000) or more, exclusive of renewal fees, such bond shall be in an amount not less than fifty thousand dollars (\$50,000).

(b) Every discount buying club shall hold advance payments for goods and services in trust in a separate account used solely for that purpose. The funds in such account shall be held free from all liens. Records of such account shall be kept by the buying club in the regular course of its business sufficient to identify the amount held for each customer, the dates of the receipt and withdrawal of funds, and the purpose of withdrawal. Such records must be retained for a period not less than four years following withdrawal. Funds may not be withdrawn from the trust account unless and until (i) the ordered goods have been actually delivered to the customer or consigned to a certified public carrier, or (ii) ordered services have been provided in full, or (iii) the buying club has refunded the customer's payment.

(c) Any person who is damaged by any violation of this Article, or by any breach by the discount buying club of its contract, may bring an action against the bond, provided that the aggregate liability of the surety shall not exceed the amount of the bond.

(d) Violations of subsections (a) or (b) of this section shall constitute a Class J felony. (1981, c. 594, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

§ 66-136. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 594, s. 1.)

§§ 66-137 to 66-141: Reserved for future codification purposes.

ARTICLE 23.***Rental Referral Agencies.*****§ 66-142. Definition.**

For the purposes of this Article, a "rental referral agency" is a person or business which offers to assist any person in locating residential rental property in return for any consideration from a prospective tenant. (1981, c. 610, s. 1.)

Editor's Note. — Session Laws 1981, c. 610, s. 2, makes this Article effective July 1, 1981.

§ 66-143. Fees and deposits.

(a) A rental referral agency shall not charge or attempt to collect any fees or other consideration from any prospective tenant except where rental housing is in fact obtained by such person through the assistance of that agency. For the purposes of this Article, such housing is obtained when the prospective tenant has contracted to rent the property.

(b) Deposits to be applied toward fees may be required by a rental referral agency pursuant to a written contract which includes provisions stating:

- (1) The specifications of housing sought by the prospective tenant, including maximum rent, desired lease period, geographic area, number of bedrooms required, number of children to be housed, and number and type of pets;
- (2) That the deposit will be refunded within 10 days of the prospective tenant's request should the specified housing not be obtained through the agency's assistance within 30 days of the date of the contract;
- (3) That the rental referral agency will maintain a trust account or bond in compliance with G.S. 66-145, and identifying the depository institution or bonding company by name and address. (1981, c. 610, s. 1.)

§ 66-144. Representations of availability.

(a) A rental referral agency shall not make any representation that any property is available for rent unless availability has been verified by the agency within 48 hours prior to the representation. The availability of property described in media advertisements shall be verified within 48 hours prior to the appearance of the advertisement.

(b) Notations of the time and date of verification and the verifier's identity shall be recorded by the agency and made available for inspection by any person from whom the agency has received a deposit or a fee. (1981, c. 610, s. 1.)

§ 66-145. Bond or trust account required.

(a) Every rental referral agency before beginning business shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. Each deposit to be applied towards a fee collected under G.S. 66-143(b) shall be placed in the trust account and shall be withdrawn only to refund the deposit to the applicant pursuant to G.S. 66-143(b)(2) or when a fee is earned by the agency as provided in G.S. 66-143(a).

(b) A rental referral agency may elect to post a bond in lieu of the trust account required by this section. The amount of the bond shall at no time be less than the amount that would be required by this section to be held in trust. In no event, however, shall the bond be less than five thousand dollars (\$5,000). The rental referral agency shall file the bond with the clerk of the superior court of the county in which its principal place of business is located.

(c) Any person who is damaged by any violation of this Article, or by any breach by the rental referral agency of its contract, may bring an action for the remedies referred to and provided in G.S. 66-146 against the bond or trust account; provided that the aggregate liability of the surety or trustee shall not exceed the amount of the bond or trust account.

(d) Violation of subsections (a) or (b) of this section shall constitute a misdemeanor. (1981, c. 610, s. 1.)

§ 66-146. Remedies.

(a) Any person injured by a violation of this Article, or breach of any obligation created by this Article or contract subject thereto, may bring an action for recovery of damages, including reasonable attorneys' fees.

(b) The violation of any provision of this Article shall constitute an unfair act or practice under G.S. 75-1.1.

(c) The remedies provided herein shall be in addition to any other remedies provided by law or equity. (1981, c. 610, s. 1.)

§§ 66-147 to 66-151: Reserved for future codification purposes.

ARTICLE 24.***Trade Secrets Protection Act.*****§ 66-152. Definitions.**

As used in this Article, unless the context requires otherwise:

- (1) "Misappropriation" means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.
- (2) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, joint venture, or any other legal or commercial entity.
- (3) "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
 - a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through indepen-

dent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

- b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons. (1981, c. 890, s. 1.)

Editor's Note. — Session Laws 1981, c. 890, s. 3 provides: "This act shall become effective October 1, 1981 and shall apply only to causes of action arising after that date."

Legal Periodicals. — For survey of 1981

commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing the North Carolina Trade Secrets Protection Act, see 18 Wake Forest L. Rev. 823 (1982).

§ 66-153. Action for misappropriation.

The owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret. (1981, c. 890, s. 1.)

§ 66-154. Remedies.

(a) Except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation.

- (1) If the court determines that it would be unreasonable to enjoin use after a judgment finding misappropriation, an injunction may condition such use upon payment of a reasonable royalty for any period the court may deem just. In appropriate circumstances, affirmative acts to protect the trade secret may be compelled by order of the court.
- (2) A person who in good faith derives knowledge of a trade secret from or through misappropriation or by mistake, or any other person subsequently acquiring the trade secret therefrom or thereby, shall be enjoined from disclosing the trade secret, but no damages shall be awarded against any person for any misappropriation prior to the time the person knows or has reason to know that it is a trade secret. If the person has substantially changed his position in good faith reliance upon the availability of the trade secret for future use, he shall not be enjoined from using the trade secret but may be required to pay a reasonable royalty as deemed just by the court. If the person has acquired inventory through such knowledge or use of a trade secret, he can dispose of the inventory without payment of royalty. If his use of the trade secret has no adverse economic effect upon the owner of the trade secret, the only available remedy shall be an injunction against disclosure.

(b) In addition to the relief authorized by subsection (a), actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater.

(c) If willful and malicious misappropriation exists, the trier of fact also may award punitive damages in its discretion.

(d) If a claim of misappropriation is made in bad faith or if willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party. (1981, c. 890, s. 1.)

§ 66-155. Burden of proof.

Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:

- (1) Knows or should have known of the trade secret; and
- (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

This prima facie evidence is rebutted by the introduction of substantial evidence that the person against whom relief is sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law. (1981, c. 890, s. 1.)

§ 66-156. Preservation of secrecy.

In an action under this Article, a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval. (1981, c. 890, s. 1.)

§ 66-157. Statute of limitations.

An action for misappropriation of a trade secret must be commenced within three years after the misappropriation complained of is or reasonably should have been discovered. (1981, c. 890, s. 1.)

§§ 66-158 to 66-162: Reserved for future codification purposes.

ARTICLE 25.***Regulation of Precious Metal Businesses.*****§ 66-163. Legislative finding.**

The General Assembly finds and declares that precious metal businesses in North Carolina vitally affect the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate such businesses, in order to prevent thefts, disposal of stolen property, and other abuses upon its citizens. (1981, c. 956, s. 1.)

Editor's Note. — Session Laws 1981, c. 956, s. 5, makes the act effective October 1, 1981, except for s. 4, which is made effective on the date of ratification, July 10, 1981.

Session Laws 1981, c. 956, ss. 3 and 4, provide: "Sec.3. All general or local laws governing precious metals businesses in counties or towns are repealed.

"Sec.4. Local law enforcement agencies shall commence processing filed applications for permits and exemptions no later than August 1, 1981."

Session Laws 1981, c. 956, s. 2, contains a severability clause.

§ 66-164. Definitions.

Unless the context clearly indicates otherwise, the following words and phrases shall have the following meanings:

- (1) "Dealer" means a person who engages in the business of purchasing precious metals from the public in the form of jewelry, flatware, silver services or other forms and holds himself out to the public by signs, advertising or other methods as engaging in such purchases including any independent contractor purchasing precious metals under any arrangement in any department store; provided, however, that permanently located retail merchants shall be exempted insofar as they make purchases directly from manufacturers or wholesalers of precious metals for their inventories. Provided further, a permanently located retail merchant who is primarily engaged in the business of purchasing or acquiring jewelry, secondhand furniture, antique furniture, objects of art, artifacts, nonprecious metal collector items, antiquities and other used household furnishings or fixtures for resale to the public, and who purchases precious metals, articles or items from the public only incidentally to his main business, may be exempted as provided in G.S. 66-166 if his total purchases or acquisitions of precious metals from the public constituted ten percent (10%) or less in dollar volume of the total purchases or acquisitions in dollar volume made by such merchant for all such secondhand items or articles in the 12-month period next preceding the date of application for an exemption under G.S. 66-166. Provided further that pawnbrokers as defined in G.S. 91-1 shall be exempted insofar as they accept pawns or pledges of items made of precious metals under the provisions of Chapter 91 of the General Statutes.
- (2) "Local law enforcement agency" means:
 - a. The county police force; or
 - b. The county sheriff's office in a county with no county police force for any business located outside the corporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force. "Local law enforcement agency" means the municipal police for any business located within the corporate limits of a municipality having a police force.
- (3) "Precious metal" means gold, silver, or platinum.
 - a. "Gold" is defined as any item or article containing ten (10) karat of gold or more which may be in combination or alloy with any other metal.
 - b. "Silver" is defined as any item or article containing 925 parts per thousand of silver which may be in combination or alloy with any nonprecious metal or which is marked "sterling".
 - c. "Platinum" is defined as any item or article containing 900 parts per thousand or more of platinum which may be in combination or alloy with any metal.

For purposes of this Article, "precious metal" does not include coins, medals, medallions, tokens, numismatic items, art ingots, or art bars. (1981, c. 956, s. 1; c. 1001, s. 3.)

Effect of Amendments. — The 1981 amendment made by Session Laws 1981, c. 1001, s. 3, added the last proviso in subdivision (1), but does not specifically mention that subdivision.

Session Laws 1981, c. 1001, s. 5, makes the act effective upon ratification. The act was ratified Oct. 9, 1981.

§ 66-165. Permits required.

(a) Except as provided in subsection (c), it shall be unlawful for any person to engage as a dealer in the business of purchasing precious metals either as a separate business or in connection with other business operations without first obtaining a permit for the business from the local law-enforcement agency. The form of the permit and application therefor shall be as approved by the Department of Crime Control and Public Safety. The application shall be given under oath and shall be notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit. A separate permit shall be issued for each location, place, or premises within the jurisdiction of the local law-enforcement agency which is used for the conduction of a precious metals business, and each permit shall designate the location, place or premises to which it applies. Such business shall not be conducted in any other place than that designated in the permit, and no business shall be conducted in a mobile home, trailer, camper, or other vehicle, or structure not permanently affixed to the ground or in any room customarily used for lodging in any hotel, motel, tourist court, or tourist home as defined in G.S. 105-61. The permit shall be posted in a prominent place on the designated premises. Permits shall be valid for a period of 12 months from the date issued and may be renewed without a waiting period upon filing of an application and payment of the annual fee. The annual fee for each dealer's permits within each jurisdiction shall be ten dollars (\$10.00) to provide for the administrative costs of the local law-enforcement agency, including purchase of required forms. The fee shall not be refundable even if the permits are denied or later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

Any dealer applying to the local law-enforcement agency for a permit shall furnish the local law-enforcement agency with the following information:

- (1) His full name, and any other names used by the applicant during the preceding five years. In the case of a partnership, association, or corporation, the applicant shall list any partnership, association, or corporate names used during the preceding five years;
- (2) Current address, and all addresses used by the applicant during the preceding five years;
- (3) Physical description;
- (4) Age;
- (5) Driver's license number, if any, and state of issuance;
- (6) Recent photograph;
- (7) Record of felony convictions; and
- (8) Record of other convictions during the preceding five years.

If the applicant for a dealer's permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a dealer's permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

(b) Every employee engaged in the precious metal business shall, within two days of being so engaged, register his name and address with the local law-enforcement agency and have his photograph taken by the agency. The agency shall issue to him a certificate of compliance with this section upon the applicant's payment of the sum of three dollars (\$3.00) to the agency. The permit shall be posted in the work area of the permit holder.

(c) A special occasion permit authorizes the permittee to purchase precious metals as a dealer participating in any trade shows, antique shows, and crafts shows conducted within the State. A special occasion permit shall be issued by any local law-enforcement agency; provided, however, that a permittee under subsection (a) shall apply for a special occasion permit with the local law-enforcement agency which issued such dealer's permit. An application for a permit shall be on a form as approved by the Department of Crime Control and Public Safety and shall be given under oath and notarized. A 30-day waiting period from the date of filing of the application is required prior to initial issuance of a permit.

Any dealer applying to a local law-enforcement agency for a special occasion permit shall furnish the local law-enforcement agency with the information required in an application for a dealer's permit as set forth in (a).

If the applicant for a special occasion permit is a partnership or association, all persons owning a ten percent (10%) or more interest in the partnership or association shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the partnership or association.

If the applicant for a special occasion permit is a corporation, each officer, director and stockholder owning ten percent (10%) or more of the corporation's stock, of any class, shall comply with the provisions of this subsection. Any such permits shall be issued in the name of the corporation.

No permit shall be issued to an applicant who, within five years prior to the date of application, has been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state. In the case of a partnership, association, or corporation, no permit shall be issued to any applicant with an officer, partner, or director who has, within five years prior to the date of application, been convicted of a felony involving a crime of moral turpitude, or larceny, or receiving stolen goods or of similar charges in any federal court or a court of this or any other state.

The fee for an application for a special occasion permit shall be ten dollars (\$10.00) to provide for the administrative cost of the local law-enforcement agency including purchase of required forms. The fee shall not be refundable even if the permit is denied or is later suspended or revoked. Such permits shall be in addition to and not in lieu of other business licenses and are not transferable.

A special occasion permit shall be valid for 12 months from the date issued, unless earlier surrendered, suspended, or revoked. Application for renewal of a permit for an additional 12 months shall be on a form as approved by the Department of Crime Control and Public Safety and shall be accompanied by an application fee of ten dollars (\$10.00). A renewal fee shall not be refundable.

Each special occasion permit shall be posted in a prominent place on the premises of any show at which the permittee purchases precious metals. (1981, c. 956, s. 1.)

§ 66-166. Exemption from permits.

Any merchant claiming an exemption from the requirements of G.S. 66-165, 66-168, and 66-170 due to the percentage of his total business which constitutes precious metals purchases shall file an application therefor with the local law-enforcement agency at the same time as applications for dealers' permits

are required to be filed under the provisions of this Article. The application shall be upon a form approved by the Department of Crime Control and Public Safety and shall contain as a minimum the following information: the name, home address and business address of the applicant; the name and location of the business at its permanent address; the primary nature of the business both as to purchases and sales; the total dollar volume of purchases of precious metals during the 12-month period next preceding the date of application; the total dollar volume of all secondhand goods purchased during the same period by the business; the percentage of precious metals purchases or acquisitions to total purchases or acquisitions of secondhand goods; and the date when the merchant commenced the business under which the exemption is claimed. Such application shall be filed under the same oath as is required for a precious metals dealer permit, shall be notarized, and shall be accompanied by a fee of five dollars (\$5.00), which fee shall be retained by the local law-enforcement agency as cost for administering claims for exemptions.

The application for exemption, if granted, shall be valid for a period of 12 months. Thereafter, if the applicant seeks an exemption for the ensuing year he shall file an application for exemption 30 days before the expiration of the prior exemption.

If in any calendar month the percentage of precious metals purchased by an exempted merchant exceeds ten percent (10%) of his total purchases, he shall file notice thereof with the local law-enforcement agency. (1981, c. 956, s. 1.)

§ 66-167. Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit or exemption filed pursuant to this Article shall be guilty of a misdemeanor. (1981, c. 956, s. 1.)

§ 66-168. Bond or trust account required.

Before any permit shall be issued to a dealer pursuant to G.S. 66-165, the dealer shall execute a satisfactory cash or surety bond or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina in the sum of ten thousand dollars (\$10,000). The bond or trust account shall be in favor of the State of North Carolina. A surety bond is to be executed by the dealer and by two responsible sureties or a surety company licensed to do business in the State of North Carolina and shall be on a form approved by the Department of Crime Control and Public Safety. Any bond shall be kept in full force and effect and shall be delivered to the law-enforcement agency which first issued a current permit to the dealer. A bond or trust account shall be for the faithful performance of the requirements and obligations of the dealer's business in conformity with this Article. Any law-enforcement agency shall have full power and authority to revoke the permit and sue for forfeiture of the bond or trust account upon a breach thereof. Any person who shall have suffered any loss or damage by any act of the permittee that constitutes a violation of this Article shall have the right to institute an action to recover against such permittee and the surety or trust account. Upon termination of the bond or trust account the permit shall become void. (1981, c. 956, s. 1; c. 1001, s. 4.)

Effect of Amendments. — The 1981 amendment, effective Dec. 1, 1981, substituted "and shall be on a form approved by the Department

of Crime Control and Public Safety" for "and subject to the approval of the law-enforcement agency" at the end of the third sentence.

§ 66-169. Records to be kept.

Every dealer to whom a permit has been issued pursuant to G.S. 66-165 shall maintain a tightly bound book or books (not loose-leaf), with pages numbered in sequence, in which shall be recorded, at the time of any purchase of precious metal, a serially numbered account and description of the specific items purchased, including, if applicable, the manufacturer's name, the model, the model number, the serial number, and any engraved numbers or initials found on the items, the date of the transaction, and the name, sex, race, residence, telephone number and driver's license number, if any, of the person selling the items purchased. Both the dealer and the seller shall sign the record entry. In the event the seller cannot furnish his driver's license, passport, or military identification card bearing his photograph, the dealer shall require two forms of positive identification.

The record book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. A copy of each record book entry shall be filed within 48 hours of the transaction in the office of the local law-enforcement agency. Mailing the required copy to the local law-enforcement agency within 48 hours shall constitute compliance with this section.

The files of local law-enforcement agencies which contain such copies of record book entries shall not be subject to inspection and examination as authorized by G.S. 132-6. Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any portion of such files, unless the person is one specifically authorized by the local law-enforcement agency to have access thereto for purposes of law-enforcement investigation or civil or criminal proceedings, shall be guilty of a misdemeanor and upon conviction shall be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00).

Every merchant to whom an exemption has been issued pursuant to G.S. 66-166 shall maintain a book in which shall be recorded, at the time of any purchase of precious metal, a description of the specific items purchased and the date of the transaction. This book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. (1981, c. 956, s. 1.)

§ 66-170. Items not to be modified.

No item included in a dealer purchase shall be sold, traded or otherwise disposed of, melted, cut or otherwise changed in form nor shall any such item be removed from the licensed premises for a period of five days from the date the purchase was made. (1981, c. 956, s. 1.)

§ 66-171. Purchasing from juvenile.

No dealer or employee or agent thereof shall purchase from any juvenile under 18 years of age any article made, in whole or in part, of precious metal. (1981, c. 956, s. 1.)

§ 66-172. Penalties.

Any dealer who violates the provisions of this Article shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars (\$500.00) or imprisoned for not more than six months, or both. In addition any dealer so convicted shall be ineligible for a dealer's permit for a

period of three years from the date of conviction. Each and every violation shall constitute a separate and distinct offense. (1981, c. 956, s. 1.)

§ 66-173. Portable smelters prohibited.

It shall be unlawful for any person to possess or operate a smelter in any mobile home, trailer, camper, or other vehicle or structure not permanently affixed to the ground, for the purpose of refining precious metals. Violation of the provisions of this section shall constitute a misdemeanor and shall be punishable by a fine of not more than five hundred dollars (\$500.00) or imprisoned for not more than six months, or both. (1981, c. 956, s. 1.)

Chapter 67.

Dogs.

Article 2.

License Taxes on Dogs.

Sec.

67-15. [Repealed.]

Article 5.

Protection of Livestock and Poultry from Ranging Dogs.

67-32. [Repealed.]

ARTICLE 1.

Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.

CASE NOTES

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

ARTICLE 2.

License Taxes on Dogs.

§ 67-15: Repealed by Session Laws 1983, c. 35, s. 2.

Cross References. — As to the larceny of animals, see now § 14-84.

3, makes the act effective for offenses committed on or after October 1, 1983.

Editor's Note. — Session Laws 1983, c. 35, s.

ARTICLE 5.

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-31. Powers and duties of dog warden.

Local Modification. —

Chowan: 1983, c. 166; Dare: 1983, c. 166;

Edgecombe County: 1983, c. 683; Pasquotank: 1983, c. 166.

§ 67-32: Repealed by Session Laws 1983, c. 891, s. 9, effective January 1, 1984.

Cross References. — As to control of rabies, see § 130A-184 et seq.

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides:

"This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of

the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by

this act prior to the effective date of this act shall remain valid as if this act had not been enacted.”
Repealed § 67-32 was amended by Session Laws 1983, c. 834.

§ 67-36. Article supplements existing laws.

Local Modification. — Chowan: 1983, c. 166; Dare: 1983, c. 166; Pasquotank: 1983, c. 166.

Chapter 68.

Fences and Stock Law.

ARTICLE 3.

Livestock Law.

§ 68-15. Term "livestock" defined.

CASE NOTES

Applied in *Development Assocs. v. Wake County Bd. of Adjustment*, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 68-16. Allowing livestock to run at large forbidden.

CASE NOTES

Cited in *Rhoads v. Bryant*, 56 N.C. App. 635, 289 S.E.2d 637 (1982).

Chapter 69.

Fire Protection.

Article 3A.

Rural Fire Protection Districts.

Sec.

69-25.1. Election to be held upon petition of voters.

69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.

Sec.

69-25.4. Tax to be levied and used for furnishing fire protection.

Article 5.

Authority and Liability of Firemen.

69-39.1. Liability limited.

ARTICLE 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area lying outside the corporate limits of any city or town, which area is described in the petition and designated as "

(Here insert name)

Fire District," the board of county commissioners of the county shall call an election in said district for the purpose of submitting to the qualified voters therein the question of levying and collecting a special tax on all taxable property in said district, of not exceeding fifteen cents (15¢) on the one hundred dollars (\$100.00) valuation of property, for the purpose of providing fire protection in said district. If the voters reject the special tax under the first paragraph of this section, then no new election may be held under the first paragraph of this section within two years on the question of levying and collecting a special tax under the first paragraph of this section in that district, or in any proposed district which includes a majority of the land within the district in which the tax was rejected.

Upon the petition of thirty-five percent (35%) of the resident freeholders living in an area which has previously been established as a fire protection district and in which there has been authorized by a vote of the people a special tax not exceeding ten cents (10¢) on the one hundred dollars (\$100.00) valuation of property within the area, the board of county commissioners shall call an election in said area for the purpose of submitting to the qualified voters therein the question of increasing the allowable special tax for fire protection within said district from ten cents (10¢) on the one hundred dollars (\$100.00) valuation to fifteen cents (15¢) on the one hundred dollars (\$100.00) valuation on all taxable property within such district. Elections on the question of increasing the allowable tax rate for fire protection shall not be held within the same district at intervals less than two years. (1951, c. 820, s. 1; 1953, c. 453, s. 1; 1959, c. 805, ss. 1, 2; 1983, c. 388, ss. 1, 1.1.)

Local Modification. — By virtue of Session Laws 1981, c. 596, Granville should be stricken from the replacement volume.

Editor's Note. —

Session Laws 1983, c. 388, s. 2, makes the act effective with respect to all petitions submitted under this section on and after 30 days after ratification of the act, but provides that the act

shall not affect any petitions submitted before that date. The act was ratified by May 26, 1983.

Effect of Amendments. — The 1983 amendment substituted "thirty-five percent (35%)" for "fifteen percent (15%)" in the first and second paragraphs and added the last sentence of the first paragraph.

§ 69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.

The board of county commissioners, after consulting with the county board of elections, shall set a date for the election by resolution adopted. The county board of elections shall hold and conduct the election in the district. The county board of elections shall advertise and conduct said election, in accordance with the provisions of this Article and with the procedures prescribed in Chapter 163 governing the conduct of special and general elections. No new registration of voters shall be required, but the deadline by which unregistered voters must register shall be contained in the legal advertisement to be published by the county board of elections. The cost of holding the election to establish a district shall be paid by the county, provided that if the district is established, then the county shall be reimbursed the cost of the election from the taxes levied within the district, but the cost of an election to increase the allowable tax under G.S. 69-25.1 or to abolish a fire district under G.S. 69-25.10 shall be paid from the funds of the district. (1951, c. 820, s. 2; 1975, c. 706; 1981, c. 786, s. 2.)

Effect of Amendments. — The 1981 amendment, inserted "to establish a district" in the fifth sentence and added the proviso at the end of that sentence.

§ 69-25.4. Tax to be levied and used for furnishing fire protection.

If a majority of the qualified voters voting at said election vote in favor of levying and collecting a tax in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in said district in such amount as it may deem necessary, not exceeding ten cents (10¢) on the one hundred dollars (\$100.00) valuation of property in said district from year to year, and shall keep the same as a separate and special fund, to be used only for furnishing fire protection within said district, as provided in G.S. 69-25.5.

Provided, that if a majority of the qualified voters voting at such elections vote in favor of levying and collecting a tax in such district, or vote in favor of increasing the tax limit in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in such districts in such amount as it may deem necessary, not exceeding fifteen cents (15¢) on the one hundred dollars (\$100.00) valuation of property in said district from year to year.

For purposes of this Article, the term "fire protection" and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death; and the levy, appropriation, and expenditure of the tax to provide such services are proper, authorized and lawful. In providing these services the fire district shall be subject to G.S. 153A-250. (1951, c. 820, s. 4; 1959, c. 805, s. 4; 1981, c. 217.)

Local Modification. — By virtue of Session Laws 1981, c. 596, Granville should be stricken from the replacement volume.

Effect of Amendments. — The 1981 amendment added the third paragraph.

§ 69-25.10. Means of abolishing tax district.

Local Modification. — By virtue of Session Laws 1979, 2nd Sess., c. 1167, s. 3, Orange County should be stricken from the replacement volume.

§ 69-25.11. Changes in area of district.**OPINIONS OF ATTORNEY GENERAL**

Property completely separated from the existing fire district is not "adjoining territory" within the meaning of the statute. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

Meaning of "Owner" and "Majority of Owners". — The legislative intent was to

include nonresident property owners, and the word "owner" should be construed to mean "resident and nonresident owners" of the territory to be included. "Majority of the owners" refers to persons and entities owning real estate in the territory. See opinion of Attorney General to Mr. Paul S. Messick, Jr., Chatham County Attorney, 50 N.C.A.G. 74 (1981).

ARTICLE 5.***Authority and Liability of Firemen.*****§ 69-39.1. Liability limited.**

(a) For the purpose of this section, a "rural fire department" means a bona fide fire department incorporated as a nonprofit corporation which under schedules filed with or approved by the Commissioner of Insurance, is classified as not less than Class "9" in accordance with rating methods, schedules, classifications, underwriting rules, bylaws, or regulations effective or applied with respect to the establishment of rates or premiums used or charged pursuant to Article 12B or Article 13C of Chapter 58 of the General Statutes and which operates fire apparatus of the value of five thousand dollars (\$5,000) or more.

(b) A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman. (1983, c. 520, s. 1.)

Editor's Note. — Session Laws 1983, c. 520, s. 3, makes this section effective upon ratification. The act was ratified June 14, 1983.

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

Article 1.

Indian Antiquities.

Sec.

70-5 to 70-9. [Reserved.]

Article 2.

Archaeological Resources Protection Act.

70-10. Short title.

70-11. Findings and purpose.

70-12. Definitions.

70-13. Archaeological investigations.

70-14. Rule-making authority; custody of resources.

70-15. Prohibited acts and criminal penalties.

70-16. Civil penalties.

70-17. Forfeiture.

70-18. Confidentiality.

70-19. Cooperation with private individuals.

70-20. Delegation of responsibilities.

70-21 to 70-25. [Reserved.]

Article 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

Sec.

70-26. Short title.

70-27. Findings and purpose.

70-28. Definitions.

70-29. Discovery of remains and notification of authorities.

70-30. Jurisdiction over remains.

70-31. Archaeological investigation of human skeletal remains.

70-32. Consultation with the Native American Community.

70-33. Consultation with other individuals.

70-34. Skeletal analysis.

70-35. Disposition of human skeletal remains.

70-36. Financial responsibility.

70-37. Prohibited acts.

70-38. Rule-making authority.

70-39. Exceptions.

70-40. Penalties.

ARTICLE 1.

Indian Antiquities.

§§ 70-5 to 70-9: Reserved for future codification purposes.

ARTICLE 2.

Archaeological Resources Protection Act.

§ 70-10. Short title.

This Article shall be known as "The Archaeological Resources Protection Act." (1981, c. 904, s. 2.)

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

§ 70-11. Findings and purpose.

(a) The General Assembly finds that:

- (1) Archaeological resources on State lands are an accessible and irreplaceable part of the State's heritage;
- (2) These resources are increasingly endangered because of their commercial attractiveness;

- (3) Existing State laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage; and
 - (4) There is a wealth of archaeological information which has been legally obtained by private individuals for noncommercial purposes and which could voluntarily be made available to professional archaeologists and institutions.
- (b) The purpose of this Article is to secure, for the present and future benefit of the people of North Carolina, the protection of archaeological resources and sites which are on State lands, excluding highway right-of-ways, and to foster increased cooperation and exchange of information among governmental authorities, the professional archaeological community, Indian Tribal governmental authorities and private individuals having collections of archaeological resources and data. (1981, c. 904, s. 2.)

§ 70-12. Definitions.

As used in this Article, unless the context clearly indicates otherwise:

- (1) "Archaeological investigation" means any surface collection, subsurface tests, excavation, or other activity that results in the disturbance or removal of archaeological resources.
- (2) "Archaeological resource" means any material remains of past human life or activities which are at least 50 years old and which are of archaeological interest, including pieces of pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, rock paintings, rock carvings, intaglios, graves or human skeletal materials. Paleontological specimens are not to be considered archaeological resources unless found in an archaeological context.
- (3) "State lands" means any lands owned, occupied, or controlled by the State of North Carolina, with the exception of those lands under short term lease solely for archaeological purposes, excluding highway right-of-ways. (1981, c. 904, s. 2.)

§ 70-13. Archaeological investigations.

(a) Any person may apply to the Department of Administration for a permit to conduct archaeological investigations on State lands. The application shall contain information the Department of Administration, in consultation with the Department of Cultural Resources, deems necessary, including the time, scope, location and specific purpose of the proposed work.

(b) A permit shall be issued pursuant to an application under subsection (a) of this section if, after any notifications and consultations required by subsection (d) of this section, the Department of Administration, in consultation with the Department of Cultural Resources, finds that:

- (1) The applicant is qualified to carry out the permitted activity;
- (2) The proposed activity is undertaken for the purpose of furthering archaeological knowledge in the public interest;
- (3) The currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved;
- (4) The funds and the time the applicant proposes to commit are such that the significant information contained in the archaeological resources can be retrieved;
- (5) The archaeological resources which are collected, excavated or removed from State lands and associated records and data will remain the property of the State of North Carolina and the resources and copies of associated archaeological records and data will be preserved

by a suitable university, museum, or other scientific or educational institution;

- (6) The activity pursuant to the permit is not inconsistent with any management plan applicable to the State lands concerned; and
- (7) The applicant shall bear the financial responsibility for the reinterment of any human burials or human skeletal remains excavated or removed as a result of the permitted activities.

(c) A permit may contain any terms, conditions or limitations the Department of Administration, in consultation with the Department of Cultural Resources, deems necessary to achieve the intent of this Article. A permit shall identify the person responsible for carrying out the archaeological investigation.

(d) If a permit issued under G.S. 70-13(a) may result in harm to, or destruction of, any religious or cultural site, as determined by the Department of Administration, in consultation with the Department of Cultural Resources, before issuing such permit, the Department of Administration, in consultation with the Department of Cultural Resources, shall notify and consult with, insofar as possible, a local representative of an appropriate religious or cultural group. If the religious or cultural site pertains to Native Americans, the Department of Administration, in consultation with the Department of Cultural Resources, shall notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director of the North Carolina Commission of Indian Affairs shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community. Such notification shall include, but not be limited to, the following:

- (1) The location and schedule of the forthcoming investigation;
- (2) Background data concerning the nature of the study; and
- (3) The purpose of the investigation and the expected results.

(e) A permit issued under G.S. 70-13 may be suspended by the Department of Administration, in consultation with the Department of Cultural Resources, upon the determination that the permit holder has violated any provision of G.S. 70-15(a) or G.S. 70-15(b). A permit may be revoked by the Department of Administration, in consultation with the Department of Cultural Resources, upon assessment of a civil penalty under G.S. 70-16 against the permit holder or upon the permit holder's conviction under G.S. 70-15. (1981, c. 904, s. 2.)

§ 70-14. Rule-making authority; custody of resources.

The North Carolina Historical Commission, in consultation with the Department of Administration, may promulgate regulations to implement the provisions of this Article and to provide for the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from State lands pursuant to this Article, and the ultimate disposition of those resources. (1981, c. 904, s. 2.)

§ 70-15. Prohibited acts and criminal penalties.

(a) No person may excavate, remove, damage or otherwise alter or deface any archaeological resource located on State lands unless he is acting pursuant to a permit issued under G.S. 70-13.

(b) No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, exchange, transport or receive any archaeological resource excavated or removed from State lands in violation of the prohibition contained in G.S. 70-15(a).

(c) Any person who knowingly and willfully violates or employs any other person to violate any prohibition contained in G.S. 70-15(a) or G.S. 70-15(b) shall upon conviction, be fined not more than two thousand dollars (\$2,000) or

imprisoned not more than six months, or both, in the discretion of the court.

(d) Each day on which a violation occurs shall be a separate and distinct offense. (1981, c. 904, s. 2.)

§ 70-16. Civil penalties.

A civil penalty of not more than five thousand dollars (\$5,000) may be assessed by the Department of Administration, in consultation with the Department of Cultural Resources, against any person who violates the provisions of G.S. 70-15. In determining the amount of the penalty, the Department shall consider the extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed shall be notified of the assessment by registered or certified mail. The notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, the Department may institute a civil action in the Superior Court of Wake County to recover the amount of the assessment. In the civil action, the scope of the court's review of the Department's action, including the amount of the assessment, shall be as provided in Chapter 150A of the General Statutes.

The Department may use the assessed funds to rectify the damage to archaeological resources or to otherwise effectuate the purposes of this Article. (1981, c. 904, s. 2.)

§ 70-17. Forfeiture.

All archaeological resources with respect to which a violation of G.S. 70-15(a) or 70-15(b) occurred, and all vehicles and equipment which were used in connection with such violation shall be subject to forfeiture to the State of North Carolina in the same manner as vehicles and equipment subject to forfeiture under G.S. 90-112. (1981, c. 904, s. 2.)

§ 70-18. Confidentiality.

Information concerning the nature and location of any archaeological resource, regardless of the ownership of the property, may be made available to the public under Chapter 132 of the North Carolina General Statutes or under any other provision of law unless the Department of Cultural Resources determines that the disclosures would create a risk of harm to such resources or to the site at which such resources are located. (1981, c. 904, s. 2.)

§ 70-19. Cooperation with private individuals.

The Department of Cultural Resources shall take any action necessary, consistent with the purposes of this Article, to foster and improve the communication, cooperation, and exchange of information between:

- (1) Private individuals having collections of archaeological resources and data which were obtained through legal means, and
- (2) Professional archaeologists and associations of professional archaeologists concerned with the archaeological resources of North Carolina and of the United States. (1981, c. 904, s. 2.)

§ 70-20. Delegation of responsibilities.

If the Department of Administration and the Department of Cultural Resources agree, the responsibilities, in whole or in part, of the Department of Cultural Resources under this Article may be delegated through a memorandum of understanding to the Department of Administration. Such a memorandum of understanding will be subject to periodic review at the initiation of either party to the memorandum. (1981, c. 904, s. 2.)

§§ 70-21 to 70-25: Reserved for future codification purposes.

ARTICLE 3.

Unmarked Human Burial and Human Skeletal Remains Protection Act.

§ 70-26. Short title.

This Article shall be known as "The Unmarked Human Burial and Human Skeletal Remains Protection Act." (1981, c. 853, s. 2.)

Editor's Note. — Session Laws 1981, c. 853, s. 6, makes this Article effective Oct. 1, 1981.

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

§ 70-27. Findings and purpose.

(a) The General Assembly finds that:

- (1) Unmarked human burials and human skeletal remains are subject to vandalism and inadvertent destruction at an ever-increasing rate;
- (2) Existing State laws do not provide adequate protection to prevent damage to and destruction of these remains;
- (3) There is a great deal of scientific information to be gained from the proper excavation, study and analysis of human skeletal remains recovered from such burials; and
- (4) There has been no procedure for descendants or other interested individuals to make known their concerns regarding disposition of these remains.

(b) The purpose of this Article is (i) to provide adequate protection from vandalism for unmarked human burials and human skeletal remains, (ii) to provide adequate protection for unmarked human burials and human skeletal remains not within the jurisdiction of the medical examiner pursuant to G.S. 130-198 that are encountered during archaeological excavation, construction, or other ground disturbing activities, found anywhere within the State except on federal land, and (iii) to provide for adequate skeletal analysis of remains removed or excavated from unmarked human burials if the analysis would result in valuable scientific information. (1981, c. 853, s. 2.)

§ 70-28. Definitions.

As used in this Article:

- (1) "Chief Archaeologist" means the Chief Archaeologist, Archaeology Branch, Archaeology and Historic Preservation Section, Division of Archives and History, Department of Cultural Resources.
- (2) "Executive Director" means the Executive Director of the North Carolina Commission of Indian Affairs.
- (3) "Human skeletal remains" or "remains" means any part of the body of a deceased human being in any stage of decomposition.
- (4) "Professional archaeologist" means a person having (i) a postgraduate degree in archaeology, anthropology, history, or another related field with a specialization in archaeology, (ii) a minimum of one year's experience in conducting basic archaeological field research, including the excavation and removal of human skeletal remains, and (iii) designed and executed an archaeological study and presented the written results and interpretations of such study.

- (5) "Skeletal analyst" means any person having (i) a postgraduate degree in a field involving the study of the human skeleton such as skeletal biology, forensic osteology or other relevant aspects of physical anthropology or medicine, (ii) a minimum of one year's experience in conducting laboratory reconstruction and analysis of skeletal remains, including the differentiation of the physical characteristics denoting cultural or biological affinity, and (iii) designed and executed a skeletal analysis, and presented the written results and interpretations of such analysis.
- (6) "Unmarked human burial" means any interment of human skeletal remains for which there exists no grave marker or any other historical documentation providing information as to the identity of the deceased. (1981, c. 853, s. 2.)

§ 70-29. Discovery of remains and notification of authorities.

(a) Any person knowing or having reasonable grounds to believe that unmarked human burials or human skeletal remains are being disturbed, destroyed, defaced, mutilated, removed, or exposed, shall notify immediately the medical examiner of the county in which the remains are encountered.

(b) If the unmarked human burials or human skeletal remains are encountered as a result of construction or agricultural activities, disturbance of the remains shall cease immediately and shall not resume without authorization from either the county medical examiner or the Chief Archaeologist, under the provisions of G.S. 70-30(c) or 70-30(d).

(c) (1) If the unmarked human burials or human skeletal remains are encountered by a professional archaeologist, as a result of survey or test excavations, the remains may be excavated and other activities may resume after notification, by telephone or registered letter, is provided to the Chief Archaeologist. The treatment, analysis and disposition of the remains shall come under the provisions of G.S. 70-34 and 70-35.

(2) If a professional archaeologist directing long-term (research designed to continue for one or more field seasons of four or more weeks' duration) systematic archaeological research sponsored by any accredited college or university in North Carolina, as a part of his research, recovers Native American skeletal remains, he may be exempted from the provisions of G.S. 70-30, 70-31, 70-32, 70-33, 70-34 and 70-35(c) of this Article so long as he:

- a. Notifies the Executive Director within five working days of the initial discovery of Native American skeletal remains;
- b. Reports to the Executive Director, at agreed upon intervals, the status of the project;
- c. Curates the skeletal remains prior to ultimate disposition; and
- d. Conducts no destructive skeletal analysis without the express permission of the Executive Director.

Upon completion of the project fieldwork, the professional archaeologist, in consultation with the skeletal analyst and the Executive Director, shall determine the schedule for the completion of the skeletal analysis. In the event of a disagreement, the time for completion of the skeletal analysis shall not exceed four years. The Executive Director shall have authority concerning the ultimate disposition of the Native American skeletal remains after analysis is completed in accordance with G.S. 70-35(a) and 70-36(b) and (c).

(d) The Chief Archaeologist shall notify the Chief, Medical Examiner Section, Division of Health Services, Department of Human Resources, of any

reported human skeletal remains discovered by a professional archaeologist. (1981, c. 853, s. 2.)

§ 70-30. Jurisdiction over remains.

(a) Subsequent to notification of the discovery of an unmarked human burial or human skeletal remains, the medical examiner of the county in which the remains were encountered shall determine as soon as possible whether the remains are subject to the provisions of G.S. 130-198.

(b) If the county medical examiner determines that the remains are subject to the provisions of G.S. 130-198, he will immediately proceed with his investigation.

(c) If the county medical examiner determines that the remains are not subject to the provisions of G.S. 130-198, he shall so notify the Chief Medical Examiner. The Chief Medical Examiner shall notify the Chief Archaeologist of the discovery of the human skeletal remains and the findings of the county medical examiner. The Chief Archaeologist shall immediately take charge of the remains.

(d) Subsequent to taking charge of the human skeletal remains, the Chief Archaeologist shall have 48 hours to make arrangements with the landowner for the protection or removal of the unmarked human burial or human skeletal remains. The Chief Archaeologist shall have no authority over the remains at the end of the 48-hour period and may not prohibit the resumption of the construction or agricultural activities without the permission of the landowner. (1981, c. 853, s. 2.)

§ 70-31. Archaeological investigation of human skeletal remains.

(a) If an agreement is reached with the landowner for the excavation of the human skeletal remains, the Chief Archaeologist shall either designate a member of his staff or authorize another professional archaeologist to excavate or supervise the excavation.

(b) The professional archaeologist excavating human skeletal remains shall report to the Chief Archaeologist, either in writing or by telephone, his opinion on the cultural and biological characteristics of the remains. This report shall be transmitted as soon as possible after the commencement of excavation, but no later than two full business days after the removal of a burial.

(c) The Chief Archaeologist, in consultation with the professional archaeologist excavating the remains, shall determine where the remains shall be held subsequent to excavation, pending other arrangements according to G.S. 70-32 or 70-33.

(d) The Department of Cultural Resources may obtain administrative inspection warrants pursuant to the provisions of Chapter 15, Article 4A of the General Statutes to enforce the provisions of this Article, provided that prior to the requesting of the administrative warrant, the Department shall contact the affected landowners and request their consent for access to their land for the purpose of gathering such information. If consent is not granted, the Department shall give reasonable notice of the time, place and before whom the administrative warrant will be requested so that the owner or owners may have an opportunity to be heard. (1981, c. 853, s. 2.)

§ 70-32. Consultation with the Native American Community.

(a) If the professional archaeologist determines that the human skeletal remains are Native American, the Chief Archaeologist shall immediately notify the Executive Director of the North Carolina Commission of Indian Affairs. The Executive Director shall notify and consult with the Eastern Band of Cherokee or other appropriate tribal group or community.

(b) Within four weeks of the notification, the Executive Director shall communicate in writing to the Chief Archaeologist, the concerns of the Commission of Indian Affairs and an appropriate tribal group or community with regard to the treatment and ultimate disposition of the Native American skeletal remains.

(c) Within 90 days of receipt of the concerns of the Commission of Indian Affairs, the Chief Archaeologist and the Executive Director, with the approval of the principal tribal official of an appropriate tribe, shall prepare a written agreement concerning the treatment and ultimate disposition of the Native American skeletal remains. The written agreement shall include the following:

- (1) Designation of a qualified skeletal analyst to work on the skeletal remains;
- (2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
- (3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the Chief Archaeologist and the Executive Director by the skeletal analyst; and
- (4) A plan for the ultimate disposition of the Native American remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached within 90 days, the Archaeological Advisory Committee shall determine the terms of the agreement. (1981, c. 853, s. 2.)

§ 70-33. Consultation with other individuals.

(a) If the professional archaeologist determines that the human skeletal remains are other than Native American, the Chief Archaeologist shall publish notice that excavation of the remains has occurred, at least once per week for four successive weeks in a newspaper of general circulation in the county where the burials or skeletal remains were situated, in an effort to determine the identity or next of kin or both of the deceased.

(b) If the next of kin are located, within 90 days the Chief Archaeologist in consultation with the next of kin shall prepare a written agreement concerning the treatment and ultimate disposition of the skeletal remains. The written agreement shall include:

- (1) Designation of a qualified skeletal analyst to work on the skeletal remains;
- (2) The type of analysis and the specific period of time to be provided for analysis of the skeletal remains;
- (3) The timetable for written progress reports and the final report concerning the skeletal analysis to be provided to the Chief Archaeologist and the next of kin by the skeletal analyst; and
- (4) A plan for the ultimate disposition of the skeletal remains subsequent to the completion of adequate skeletal analysis.

If no agreement is reached, the remains shall be handled according to the wishes of the next of kin. (1981, c. 853, s. 2.)

§ 70-34. Skeletal analysis.

(a) Skeletal analysis conducted under the provisions of this Article shall only be accomplished by persons having those qualifications expressed in G.S. 70-28(5).

(b) Prior to the execution of the written agreements outlined in G.S. 70-32(c) and 70-33(b), the Chief Archaeologist shall consult with both the professional archaeologist and the skeletal analyst investigating the remains.

(c) The professional archaeologist and the skeletal analyst shall submit a proposal to the Chief Archaeologist within the 90-day period set forth in G.S. 70-32(c) and 70-33(b), including:

- (1) Methodology and techniques to be utilized;
- (2) Research objectives;
- (3) Proposed time schedule for completion of the analysis; and
- (4) Proposed time intervals for written progress reports and the final report to be submitted.

(d) If the terms of the written agreement are not substantially met, the Executive Director or the next of kin, after consultation with the Chief Archaeologist, may take possession of the skeletal remains. In such case, the Chief Archaeologist may ensure that appropriate skeletal analysis is conducted by another qualified skeletal analyst prior to ultimate disposition of the skeletal remains. (1981, c. 853, s. 2.)

§ 70-35. Disposition of human skeletal remains.

(a) If the skeletal remains are Native American, the Executive Director, after consultation with an appropriate tribal group or community, shall determine the ultimate disposition of the remains after the analysis.

(b) If the skeletal remains are other than Native American and the next of kin have been identified, the next of kin shall have authority concerning the ultimate disposition of the remains after the analysis.

(c) If the Chief Archaeologist has received no information or communication concerning the identity or next of kin of the deceased, the skeletal remains shall be transferred to the Chief Archaeologist and permanently curated according to standard museum procedures after adequate skeletal analysis. (1981, c. 853, s. 2.)

§ 70-36. Financial responsibility.

(a) The provisions of this Article shall not require that the owner of the land on which the unmarked human burials or human skeletal remains are found, bear the cost of excavation, removal, analysis or disposition.

(b) If a determination is made by the Executive Director, in consultation with an appropriate tribal group or community, that Native American skeletal remains shall be reinterred following the completion of skeletal analysis, an appropriate tribal group or community may provide a suitable burial location. If it elects not to do so, it shall be the responsibility of the North Carolina Commission of Indian Affairs to provide a suitable burial location.

(c) The expense of transportation of Native American remains to the reburial location shall be borne by the party conducting the excavation and removal of the skeletal remains. The reburial ceremony may be provided by an appropriate tribal group or community. If it elects not to do so, the reburial ceremony shall be the responsibility of the Commission of Indian Affairs. (1981, c. 853, s. 2.)

§ 70-37. Prohibited acts.

(a) No person, unless acting under the provisions of G.S. 130-198 through G.S. 130-201, shall:

- (1) Knowingly acquire any human skeletal remains removed from unmarked burials in North Carolina after October 1, 1981, except in accordance with the provisions of this Article;
- (2) Knowingly exhibit or sell any human skeletal remains acquired from unmarked burials in North Carolina; or
- (3) Knowingly retain human skeletal remains acquired from unmarked burials in North Carolina after October 1, 1981, for scientific analysis beyond a period of time provided for such analysis pursuant to the provisions of G.S. 70-32, 70-33 and 70-34, with the exception of those skeletal remains curated under the provisions of G.S. 70-35.

(b) Other provisions of criminal law concerning vandalism of unmarked human burials or human skeletal remains may be found in G.S. 14-149. (1981, c. 853, s. 2.)

§ 70-38. Rule-making authority.

The North Carolina Historical Commission may promulgate rules and regulations to implement the provisions of this Article. (1981, c. 853, s. 2.)

§ 70-39. Exceptions.

(a) Human skeletal remains acquired from commercial biological supply houses or through medical means are not subject to the provisions of G.S. 70-37(a).

(b) Human skeletal remains determined to be within the jurisdiction of the medical examiner according to the provisions of G.S. 130-198 are not subject to the prohibitions contained in this Article. (1981, c. 853, s. 2.)

§ 70-40. Penalties.

(a) Violation of the provisions of G.S. 70-29 is a misdemeanor.

(b) Violation of the provisions of G.S. 70-37(a) is a Class H felony. (1981, c. 853, s. 2.)

Chapter 72.

Inns, Hotels and Restaurants.

Article 1.

Innkeepers.

Sec.

72-7. Admittance of dogs to bedrooms.

Article 5.

Sanitation of Establishments Providing Food and Lodging.

72-46 to 72-49. [Repealed.]

ARTICLE 1.

Innkeepers.

§ 72-1. Must furnish accommodations; contracts for termination valid.

CASE NOTES

This section does no more, etc. —

This section does no more than state the common-law duty of an innkeeper to provide suitable lodging to guests, and carries with it no warranty of personal safety. *Urbano v. Days Inn of Am., Inc.*, 58 N.C. App. 795, 295 S.E.2d 240 (1982).

Innkeeper Not an Insurer of Invitees. —

An innkeeper or other occupier of land is not the insurer of the personal safety of business invitees. *Urbano v. Days Inn of Am., Inc.*, 58 N.C. App. 795, 295 S.E.2d 240 (1982).

§ 72-7. Admittance of dogs to bedrooms.

Except as provided in Chapter 168 of the General Statutes, it is unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars (\$50.00) or be imprisoned not more than 30 days. (1927, c. 67; 1981 (Reg. Sess., 1982), c. 1177, s. 1.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "Except as provided in Chapter 168 of the General Stat-

utes, it is unlawful" for "It shall be unlawful" at the beginning of the first paragraph.

ARTICLE 5.

Sanitation of Establishments Providing Food and Lodging.

§§ 72-46 to 72-49: Repealed by Session Laws 1983, c. 891, s. 7, effective January 1, 1984.

Cross References. — As to regulation of food and lodging facilities, see now § 130A-247 et seq.

Editor's Note. —

Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution,

conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

Repealed § 72-49 was amended by Session Laws 1983, c. 884, s. 1. Pursuant to s. 2 of c. 884, that amendment has been codified as part of § 130A-250.

Chapter 73.

Mills.

Article 2.

Condemnation for Mill by Owner of One Bank of Stream.

Sec.

73-5 to 73-13. [Repealed.]

Article 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

73-14 to 73-22. [Repealed.]

73-24. [Repealed.]

ARTICLE 2.

Condemnation for Mill by Owner of One Bank of Stream.

§§ 73-5 to 73-13: Repealed by Session Laws 1981, c. 919, s. 9, effective January 1, 1982.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

ARTICLE 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§§ 73-14 to 73-22: Repealed by Session Laws 1981, c. 919, s. 9, effective January 1, 1982.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

§ 73-24: Repealed by Session Laws 1981, c. 919, s. 9, effective January 1, 1982.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

Chapter 74.

Mines and Quarries.

Article 7.

The Mining Act of 1971.

Sec.

74-50. Permits — general.

74-51. Permits — application, granting, conditions.

74-54. Bonds.

74-64. Penalties for violations.

74-69 to 74-74. [Reserved.]

Article 8.

Control of Exploration for Uranium in North Carolina.

74-75. Legislative findings; declaration of policy.

74-76. Definitions.

74-77. Permit requirement.

Sec.

74-78. Permits; application; granting; terms; duration; renewal.

74-79. Bonds.

74-80. Abandonment.

74-81. Inspection and approval of abandonment; bond release; forfeiture.

74-82. Suspension, revocation or modification of permit.

74-83. Forfeiture proceedings.

74-84. Notice.

74-85. Hearings; appeals.

74-86. Rules and regulations.

74-87. Penalty for violations.

74-88. Confidentiality of logs, surveys, and reports.

74-89. Delay before mining permits issued.

ARTICLE 2A.

Mine Safety and Health Act.

§ 74-24.15. Rights and duties of miners.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

ARTICLE 7.

The Mining Act of 1971.

Repeal of Article. —

Session Laws 1981, c. 787, s. 9, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 74-50. Permits — general.

After July 1, 1972, no operator shall engage in mining without having first obtained from the Department an operating permit which covers the affected land and which has not terminated, been revoked, been suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

No permit shall be issued except in accordance with the procedures set forth in G.S. 74-51, nor modified or renewed except in accordance with the procedures set forth in G.S. 74-52.

An appeal from the Department's denial of a permit may be taken to the Mining Commission, as provided by G.S. 74-61.

Prior to the issuance of a new mining permit, the operator shall make a reasonable effort, satisfactory to the Department, to notify all owners of record of land adjoining the proposed site, and to notify the chief administrative officer of the county or municipality in which the site is located that he intends to conduct a mining operation on the site in question.

No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time said bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and said lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which it pertains shall automatically become void and of no further effect.

An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of said period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations which he has incurred under his approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan.

An operating permit may be renewed from time to time, pursuant to procedures set forth in G.S. 74-52.

An operating permit may be suspended or revoked for cause, pursuant to procedures set forth in G.S. 74-58. (1971, c. 545, s. 5; 1973, c. 1262, s. 33; 1981, c. 787, s. 1.)

Effect of Amendments. — The 1981 amendment added the fourth paragraph.

§ 74-51. Permits — application, granting, conditions.

Any operator desiring to engage in mining shall make written application to the Department for a permit. Such application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this Article.

The application shall be accompanied by a reclamation plan which meets the requirements of G.S. 74-53. No permit shall be issued until such plan has been approved by the Department.

The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and its contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation which the operator has failed to complete.

Before deciding whether to grant a new permit, the Department shall circulate copies of a notice of application for review and comment as it deems advisable. The Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably

required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

Upon its determination that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit. Such hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. Such public hearing shall be held within 60 days of the filing of the application.

The Department may deny such permit upon finding:

- (1) That any requirement of this Article or any rule or regulation promulgated hereunder will be violated by the proposed operation;
- (2) That the operation will have unduly adverse effects on wildlife or fresh water, estuarine, or marine fisheries;
- (3) That the operation will violate standards of air quality, surface water quality, or groundwater quality which have been promulgated by the Department of Natural Resources and Community Development;
- (4) That the operation will constitute a substantial physical hazard to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property;
- (5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;
- (6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or
- (7) That the operator has not corrected all violations which he may have committed under any prior permit and which resulted in,
 - a. Revocation of his permit,
 - b. Forfeiture of part or all of his bond or other security,
 - c. Conviction of a misdemeanor under G.S. 74-64, or
 - d. Any other court order issued under G.S. 74-64.

In the absence of any such findings, a permit shall be granted.

Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with such further reasonable and appropriate requirements and safeguards as may be deemed necessary by the Department to assure that the operation will comply fully with the requirements and objectives of this Article. Such conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds such screening to be feasible and desirable. Violation of any such conditions shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

Any operator wishing any modification of the terms and conditions of his permit or of the approved reclamation plan shall submit a request for modification in accordance with the provisions of G.S. 74-52.

If the Department denies an application for a permit, it shall notify the operator in writing, stating the reasons for its denial and any modifications in the application which would make it acceptable. The operator may thereupon modify his application or file an appeal, as provided in G.S. 74-61, but no such appeal shall be taken more than 60 days after notice of disapproval has been mailed to him at the address shown on his application.

Upon approval of an application, the Department shall set the amount of the performance bond or other security which is to be required pursuant to G.S. 74-54. The operator shall have 60 days following the mailing of such notification in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

When one operator succeeds to the interest of another in any uncompleted mining operation, by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon him by this Article with reference to such operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5; 1977, c. 771, s. 4; c. 845, s. 2; 1981, c. 787, ss. 2, 3.)

Effect of Amendments. — The 1981 amendment added the first sentence in the fourth paragraph, inserted "relevant and material" following "form and any" and "reasonably" preceding "required shall have" in the second

sentence of the fourth paragraph, added the language beginning "or if a public hearing" at the end of that sentence, and added the fifth paragraph.

§ 74-54. Bonds.

Each applicant for an operating permit, or for the renewal thereof, shall file with the Department following approval of his application and shall thereafter maintain in force a bond in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department and to the operator.

The applicant shall have the option of filing a separate bond for each operating permit or of filing a blanket bond covering all mining operations within the State for which he holds a permit. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which it pertains, less any such area where reclamation has been completed and released from coverage by the Department, pursuant to G.S. 74-56, or based on such other criteria established by the Mining Commission. The Department shall set the amount of the required bond in all cases, based upon a schedule established by the Mining Commission.

The bond shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules and regulations adopted pursuant thereto. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Notification shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, negotiable securities, a mortgage of real property acceptable to the Department, or an assignment of a savings account in a North Carolina bank on an assignment form prescribed by the Department.

If the license to do business in North Carolina of any surety upon a bond filed pursuant to this Article should be suspended or revoked, the operator shall, within 60 days after receiving notice thereof, substitute for such surety a good

and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to make such substitution, his permit shall automatically become void and of no effect. (1971, c. 545, s. 9; 1981, c. 787, s. 4.)

Effect of Amendments.—The 1981 amendment substituted “a permit” for “permits” at the end of the first sentence of the second paragraph, substituted “where” for “whose” in the second sentence of the second paragraph, added the language beginning “or based on” at the end

of that sentence, and made minor changes in punctuation in that sentence. The amendment substituted the third sentence of the second paragraph for a former third sentence that set out the specific amount of the bonds required, based upon the area of land to be reclaimed.

§ 74-64. Penalties for violations.

(a) Civil Penalties.

- (1) a. A civil penalty of not more than five thousand dollars (\$5,000) may be assessed by the Department against any person who fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars (\$5,000) per day may be assessed for each day the violation continues.
- b. Any permitted operator who violates any of the provisions of this Article, any rules or regulations promulgated thereunder, or any of the terms and conditions of his mining permit shall be subject to a civil penalty of not more than one hundred dollars (\$100.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any such civil penalty, written notice of the violation shall be given. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violation, and shall state that failure to correct the violation within that period may result in the assessment of a civil penalty.
- (2) The Department shall determine the amount of the civil penalty to be assessed pursuant to G.S. 74-64(a)(1) and shall give notice to the operator of the assessment of the civil penalty pursuant to G.S. 74-60. Said notice shall set forth in detail the violation or violations for which the civil penalty has been assessed. The operator may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-61.
- (3) If payment of any civil penalty assessed pursuant to this section is not received by the Department or equitable settlement reached within 30 days following notice to the operator of the assessment of the civil penalty, or within 30 days following the denial of any appeal by the operator pursuant to G.S. 74-61 and 74-62, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.
- (4) All funds collected pursuant to this section shall be placed in the special fund created pursuant to G.S. 74-59 and shall be used to carry out the purposes of this Article.
- (5) In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to

prevent, restrain, correct or abate any violation of this Article or any rules and regulations promulgated hereunder.

(1971, c. 545, s. 19; 1979, c. 252, s. 2; 1981, c. 787, ss. 7, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment redesignated the former subdivision (a)(1)

as the present subdivision (a)(1)a, added subdivision (a)(1)b, and inserted "or equitable settlement reached" near the beginning of subdivision (a)(3).

§§ 74-69 to 74-74: Reserved for future codification purposes.

ARTICLE 8.

Control of Exploration for Uranium in North Carolina.

§ 74-75. Legislative findings; declaration of policy.

The General Assembly finds that exploration for uranium within the State has the potential to lead to employment opportunities and other economic benefits for the citizens of North Carolina.

However, improper and unregulated exploration for uranium could adversely affect the health, safety and general welfare of the citizens of this State and could cause environmental harm.

The purpose of this Article is to assure that such exploration will be accomplished in a manner that protects the environment and the health, safety and welfare of the public. (1983, c. 279, s. 1.)

Editor's Note. — Session Laws 1983, c. 279, s. 3, makes this Article effective upon ratification. The act was ratified May 6, 1983.

§ 74-76. Definitions.

Wherever used or referred to in this Article, unless a different meaning clearly appears from the context:

- (1) "Commission" means the Mining Commission created by G.S. 143B-290.
- (2) "Department" means the Department of Natural Resources and Community Development.
- (3) "Exploration activity" means (i) the breaking of the surface soil in order to locate a natural deposit of uranium and to determine its quality and quantity or (ii) any activity that is directly connected with the breaking of the surface soil and that is undertaken to facilitate or accomplish the location and analysis of a uranium deposit. Exploration activity does not include an insignificant breaking of the surface soil and extraction of samples by hand tools for exploration purposes. This Article shall in no way limit or restrict to applicability of the Mining Act of 1971 to any activity that satisfies the definition of mining in that act.
- (4) "Land" includes submerged, tidal and estuarine lands. (1983, c. 279, s. 1.)

§ 74-77. Permit requirement.

No person shall engage in exploration activity for the discovery of uranium without having first obtained from the Department an exploration permit which covers the affected land and which has not terminated, been revoked, or otherwise become invalid. (1983, c. 279, s. 1.)

§ 74-78. Permits; application; granting; terms; duration; renewal.

(a) A person desiring to engage in exploration activities for discovery of uranium shall make written application to the Department for an exploration permit. An application shall be upon a form furnished by the Department and shall fully state the information called for. In addition, the applicant may be required to furnish any other information the Department deems necessary in order to enforce this Article.

The application shall be accompanied by a signed agreement, in form specified by the Department, that in the event a bond or other security forfeiture is ordered pursuant to G.S. 74-81, the Department and its representatives and contractors may make any necessary entries on the land and take any necessary action to carry out abandonment procedures not completed by the permit holder.

The Department shall also notify the Radiation Protection Commission of the Department of Human Resources of the application and request its views and comments on the application.

The applicant shall make a reasonable effort, satisfactory to the Department, to notify all owners of record of land adjoining the proposed site and the chief administrative officer of the county or municipality in which the proposed site is located that he intends to explore for uranium on the site.

(b) The Department shall deny an application upon finding:

- (1) That the proposed exploration activity will or is likely to violate any requirement of this Article or any rule promulgated under it; or
- (2) That the person seeking to conduct the exploration activity has not corrected all violations which he committed under a prior uranium exploration permit. In the absence of any such findings, a permit shall be granted.

The Department shall grant or deny the permit as expeditiously as possible, but in no event later than 60 days after the filing of the application and of any reasonably required supplementary information.

(c) A permit may be conditioned upon any reasonable requirements and safeguards the Department deems necessary to assure that exploration activity will comply fully with the requirements and objectives of this Article and of other applicable State environmental and public health laws.

The Department shall set the amount of the performance bond or other security required pursuant to G.S. 74-79. The applicant shall have 30 days following the mailing of notification of the bond or security requirement in which to deposit the required bond or security with the Department. The exploration permit shall be issued upon timely receipt of this deposit.

(d) Exploration permits shall be valid for a period of one year. Permits may be renewed annually upon a showing that the person conducting exploration activity has complied with this Article, the rules promulgated under it, and the terms of his permit. Renewal applications shall be upon a form furnished by the Department and shall state the information called for, as well as other information the Department deems necessary. (1983, c. 279, s. 1.)

§ 74-79. Bonds.

Each applicant for an exploration permit shall file with the Department following approval of his application and shall thereafter maintain in force a bond or other security in favor of the State of North Carolina. The bond or other security shall be acceptable to the Department and shall be in an amount determined by the Department based upon a schedule established by the Commission. That schedule shall provide for bond or other security at a level that will allow the Department, through whatever reasonable means it chooses, to perform the abandonment and other work required by this Article. The bond or other security shall be continuous in nature and shall remain in force until cancelled by the guarantor. Cancellation shall be effectuated upon written notice thereof by certified mail, return receipt requested, to the Department and to the permit holder, and shall be effective no sooner than 60 days following receipt by the Department and the operator.

The bond or other security shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules adopted pursuant to it. Liability under the bond or other security shall remain in effect until completion of abandonment or until substitution of a good and sufficient bond or other security acceptable to the Department. In no event shall the liability of the surety exceed the amount of the bond or other security required by this section.

If notice of impending cancellation is issued by the surety, or if for any reason, the bond or other security provided is suspended or revoked or ceases to be effective, the permit holder shall, within 30 days of receipt of notice thereof, substitute a good and sufficient bond or other security acceptable to the Department. Upon failure of the permit holder to make the required substitution, his permit shall automatically become void and of no effect. Any continuation of exploration after the permit becomes void and ineffective shall make him subject to all sanctions and remedies afforded by this Article. (1983, c. 279, s. 1.)

§ 74-80. Abandonment.

All exploration holes shall be abandoned by adequately plugging them with cement from the bottom of the hole upward to a point three feet below ground surface. The remainder of the hole between the top of the plug and the surface shall be filled with cuttings or nontoxic material.

If multiple aquifers are encountered that have alternating usable quality water and salt water zones, or if other conditions determined by the Department to be potentially deleterious to surface or ground water are encountered, the conditions must be isolated immediately by cement plugs. Each such hole shall be plugged with cement to prevent water from flowing into or out of the hole or mixing within the hole. Usable quality water is ground water that is used or can be used for a beneficial purpose, including, domestic, livestock, irrigation or industrial uses.

Alternative plugging procedures and materials may be utilized when the applicant has demonstrated to the Department's satisfaction that the alternatives will protect ground waters and comply with the provisions of this Article. In the event that a hole is more suitably plugged with a nonporous material other than cement, the material shall have sealing and lasting characteristics at least equal to cement.

All other excavations or disturbances made in connection with exploration activities shall be adequately reclaimed so as to protect the natural resources of the surrounding area and to prevent the release of toxic substances.

Abandonment shall be undertaken as soon as practicable after exploration, except if multiple aquifers or other conditions potentially deleterious to surface

or ground water are encountered. In any event, all abandonment shall be accomplished no later than 30 days following completion of exploration activity in an area of affected land. (1983, c. 279, s. 1.)

§ 74-81. Inspection and approval of abandonment; bond release; forfeiture.

Upon completion of abandonment of an area of affected land, the permit holder shall notify the Department on a form and in a manner it shall require. Upon receipt of the report, and at any other time it deems reasonable, the Department shall make an inspection of the area to determine whether the permit holder has complied with the requirements of this Article, any rules promulgated under it and the terms and conditions of his permit. Following its inspection, the Department shall give written notice to the permit holder of any deficiencies noted. The permit holder shall commence action within 10 days of receipt of notice to rectify these deficiencies and shall diligently proceed to correct them. The Department may extend the 10-day performance period if it finds that the permit holder is making every reasonable effort to comply.

Whenever the Department finds that the person conducting exploration activity has failed to properly abandon an area of affected land within the time allowed by G.S. 74-80 and has failed to undertake timely corrective actions following notice, it shall initiate forfeiture proceedings against the bond or other security filed pursuant to G.S. 74-79.

If the Department finds that abandonment has been properly completed, it shall so notify the person conducting the exploration activity in writing within 10 days after that finding and release him from further obligations under this Article. At the same time it shall release all or the appropriate portion of the bond or other security that has been provided. (1983, c. 279, s. 1.)

§ 74-82. Suspension, revocation or modification of permit.

The Department may revoke, suspend or modify a permit for violations of this Article, any rules promulgated under it, or other terms or conditions of the permit. This authority is subject to the "Special Provisions on Licensing" of G.S. 150A-3. (1983, c. 279, s. 1.)

§ 74-83. Forfeiture proceedings.

Whenever the Department determines the necessity of a bond or other security forfeiture under the provisions of G.S. 74-81, or whenever it revokes, suspends or modifies a permit under the provisions of G.S. 74-82, it shall request the Attorney General to initiate forfeiture proceedings against the bond or other security filed by the permit holder: Provided, however, that no such request shall be made for forfeiture of a bond or other security until the guarantor has been given written notice of the violation and a reasonable opportunity to take corrective action. These proceedings shall be brought in the name of the State of North Carolina. In these proceedings, the face amount of the bond or other security, less any amount previously released by the Department, shall be treated as liquidated damages and subject to forfeiture. All funds collected as a result of these proceedings shall be placed in a special fund and used by the Department to carry out, to the extent possible, the abandonment measures which the permit holder has failed to complete. If the amount of the bond or other security filed pursuant to this section proves to be insufficient to complete the required abandonment, the permit holder shall be liable to the Department for any excess above the amount of the bond or other security which may be required to defray the cost of completing the required reclamation. (1983, c. 279, s. 1.)

§ 74-84. Notice.

Whenever in this Article written notice is required to be given by the Department, such notice, unless otherwise provided, shall be mailed by registered or certified mail to the permanent address of the person set forth in his most recent application for an exploration permit. No other notice shall be required. (1983, c. 279, s. 1.)

§ 74-85. Hearings; appeals.

Any affected person wishing to contest the decision of the Department which approves, denies, suspends or revokes a permit, required additional abandonment work, refuses to release any or all of the bond or other security, or assesses a civil penalty, shall be entitled to an administrative hearing before the Mining Commission conducted in accordance with the provisions of Article 3 of Chapter 150A of the General Statutes. Appeal of the final decision of the Mining Commission shall be in accordance with the procedures established in Article 4 of Chapter 150A of the General Statutes. Requests for an administrative hearing must be made in writing and served upon the Mining Commission by serving the Department, within 30 days of receipt of notice of the action giving rise to the hearing. (1983, c. 279, s. 1.)

§ 74-86. Rules and regulations.

The Mining Commission may promulgate any rules necessary to administer and carry out the purposes of this Article. (1983, c. 279, s. 1.)

§ 74-87. Penalty for violations.**(a) Civil Penalties. —**

- (1) a. A civil penalty of not more than five thousand dollars (\$5,000) may be assessed by the Department against any person who fails to secure a valid exploration permit prior to engaging in the exploration for uranium, as required by G.S. 74-48. Each day of continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars (\$5,000) per day may be assessed for each day the violation continues.
- b. Any person with an exploration permit who violates any of the provisions of this Article, any rules promulgated under it, or any of the terms and conditions of his exploration permit shall be subject to a civil penalty of not more than two hundred fifty dollars (\$250.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any civil penalty, written notice of the violation shall be given pursuant to G.S. 74-84. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violations, and shall state that failure to correct the violations within that period will be considered an aggravating factor in the determination of the amount of the civil penalty, if any, to be assessed.
- (2) The Department shall determine the amount of the civil penalty to be assessed. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, the violator's state of mind in committing the violation, the prior record of the violator in complying or failing to comply with this Article, and any corrective action taken by the

violator. The Department shall notify the person conducting exploration activity of the assessment of the civil penalty by certified mail, return receipt requested or by other reasonable means calculated to provide actual notice. This notice shall describe the violations for which the civil penalty has been assessed. The person conducting exploration activity may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-85.

- (3) If payment of any civil penalty assessed pursuant to this section is not received by the Department or if no administrative hearing is requested within 30 days following notice to the person of the assessment of the civil penalty, or within 30 days following denial of appeal pursuant to G.S. 74-85, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.

- (4) All funds collected pursuant to this section shall be placed in a special fund and shall be used to carry out the purposes of this Article.

(b) Injunctive Relief. — In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any rules promulgated under it.

(c) Criminal Penalties. — In addition to other penalties provided by this Article, any person who engaged in exploration activity in willful violation of the provisions of this Article or of any rules promulgated under it or who willfully misrepresented any material fact in any action taken pursuant to this Article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1983, c. 279, s. 1.)

§ 74-88. Confidentiality of logs, surveys, and reports.

If a person engaged in uranium exploration shows to the satisfaction of the Department that logs, surveys plats, and reports filed under this Article are of a proprietary nature relating to his competitive rights, that information shall be confidential and not subject to inspection and examination (as authorized by G.S. 132-6) for four years after receipt of the information by the Department. Further, upon written request of any such person, and a showing of a continued proprietary interest affecting competitive rights, the Department shall hold the material confidential for additional two-year periods. Nothing in this section shall be construed to deny the North Carolina Geological Survey access to all logs, plats, and reports filed under this Chapter. The North Carolina Geological Survey shall be bound to hold this information confidential to the same extent that the Department is bound. (1983, c. 279, s. 1.)

§ 74-89. Delay before mining permits issued.

No permit for the mining of uranium shall be issued to an applicant for either three years, beginning with the date of issuance of his first permit to explore for uranium, or for two years, beginning with the date of the filing of his first application for a permit to mine uranium, whichever comes first. (1983, c. 279, s. 1.)

Chapter 74A.

Company Police.

Sec.

74A-2. Oath and powers of company police;
exceptions as to railroad police.

§ 74A-2. Oath and powers of company police; exceptions as to railroad police.

(c) Repealed by Session Laws 1981, c. 884, s. 4.

(1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; C. S., s. 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4; 1981, c. 884, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, deleted subsection (c), relating to bonds of company policemen.

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

Sec.

- 74C-3. Private protective services business defined.
- 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.
- 74C-5. Powers of the Board.
- 74C-8. Applications for an issuance of license.
- 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.
- 74C-10. Certificate of liability insurance required; form and approval; suspension for noncompliance.
- 74C-11. Registration of persons employed; temporary employment.
- 74C-12. Suspension or revocation of licenses; appeal.

Sec.

- 74C-13. Firearms.
- 74C-16. Prohibited acts.
- 74C-17. Enforcement.
- 74C-18. Reciprocity; temporary permit.
- 74C-20. [Repealed.]
- 74C-21 to 74C-29. [Reserved.]

Article 2.

Private Protective Services Recovery Fund.

- 74C-30. Private Protective Services Recovery Fund created; payments to Fund; management; use of funds.
- 74C-31. Application for payment out of Fund; hearing grounds.
- 74C-32. Order directing payment out of Fund.
- 74C-33. Maximum liability; pro rata distribution.

ARTICLE 1.

Private Protective Services Board.

§ 74C-1. Title.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Editor's Note. —

Session Laws 1983, c. 673, s. 1, designates §§ 74C-1 through 74C-19 as Article 1 of Chapter 74C and enacts Article 2 thereof.

Session Laws 1983, c. 786, ss. 4 and 5, provide:

"Sec. 4. When the Alarm Systems Licensing Board is established and members are appointed as provided by G.S. 74D-4, the secretary or an agent of the board shall request all records in the possession of the Private Protective Services Board pertaining to persons licensed and registered by the Private Protective Services Board in the alarm systems business, and the Administrator of said board shall deliver such records to the secretary or

agent. This section shall not apply to records and evidence collected and compiled by the Director of the State Bureau of Investigation and his assistants.

"Sec. 5. All persons licensed as alarm systems business licensees and persons registered under such licensees pursuant to the provisions of Chapter 74C of the General Statutes of North Carolina shall have such licensure and registration transferred from the Private Protective Services Board to the Alarm Systems Licensing Board as of the effective date of this act. Such licenses and registrations shall remain in effect until the expiration date appearing on the face of the license or registration. All new and renewal licenses and registrations shall be subject to the provision of this act on the effective date of this act."

§ 74C-3. Private protective services business defined.

(a) As used in this Chapter, the term "private protective services business" means and includes the following:

- (1) "Armored car business" means any person, firm, association, or corporation which provides secured transportation and protection from one place or point to another place or point of money, currency, coins,

bullion, securities, checks, documents, stocks, bonds, jewelry, paintings, and other valuables for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer. This definition does not include a person operating an armored car business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed armored car service guards shall be subject to the provisions of G.S. 74C-13.

- (2) Repealed by Session Laws 1983, c. 786, s. 2, effective January 1, 1984.
- (3) "Counterintelligence service business" means any person, firm, association, or corporation which discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.
- (4) "Courier service business" means any person, firm, association, or corporation which transports or offers to transport from one place or point to another place or point documents, papers, maps, stocks, bonds, checks, or other small items of value which require expeditious service for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer. This definition does not include a person operating a courier service business pursuant to a motor carrier certificate or permit issued by the North Carolina Utilities Commission which grants operating rights for such business; however, armed courier service guards shall be subject to the provisions of G.S. 74C-13.
- (5) "Detection of deception examiner" means any person, firm, association, or corporation which uses any device or instrument, regardless of its name or design, for the purpose of the detection of deception or any person who reviews the work product of an examiner including charts, tapes or other methods of record keeping for the purpose of detecting deception or determining accuracy.
- (6) "Security guard and patrol business" means any person, firm, association, or corporation engaging in the business of providing a private watchman, guard, or street patrol service on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performing one or more of the following functions:
- a. Prevention and/or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property;
 - b. Prevention, observation, or detection of any unauthorized activity on private property; and
 - c. Protection of patrons and persons lawfully authorized to be on the premises of the person, firm, association, or corporation for whom he contractually obligated to provide security services; and
 - d. Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.

This definition does not include a person employed regularly and exclusively as an employee by an employer in connection with the business affairs of such employer, except that if the employee is an armed

private security officer and wears, carries, or possesses a firearm in the performance of his duties, the provisions of G.S. 74C-13 shall apply; provided, however, that nothing in this Chapter shall be construed to prohibit a law-enforcement officer from being employed during his off-duty hours by a licensed security guard and patrol company on an employer-employee basis; provided further, that the police officer shall not wear his police officer's uniform or use police equipment while working for a security guard and patrol company. This definition does not include a law-enforcement officer who provides security guard and patrol services on an individual employer-employee basis to a person, firm, association, or corporation which is not engaged in a security guard and patrol business.

(7) "Guard-dog service business" means any person, firm, association, or corporation which contracts with another person, firm, association, or corporation to place, lease, rent, or sell a trained dog for the purpose of protecting lives or property for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(8) "Private detective" or "private investigator" means any person who engages in the business of or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to:

- a. Crime or wrongs done or threatened against the United States or any state or territory of the United States;
- b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;
- c. The location, disposition, or recovery of lost or stolen property;
- d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties, provided that scientific research laboratories and consultants shall not be included in this definition;
- e. Securing evidence to be used before any court, board, officer, or investigation committee; or
- f. Protection of individuals from serious bodily harm or death.

However, the employee of a security department of a private business which conducts investigations exclusively on matters internal to the business affairs of the business shall not be required to be licensed as a private detective or investigator under this Chapter.

(b) "Private protective services" shall not mean:

- (1) Insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company;
- (2) An officer or employee of the United States, this State, or any political subdivision of either while such officer or employee is engaged in the performance of his official duties within the course and scope of his employment with the United States, this State, or any political subdivision of either;
- (3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or creditworthiness of persons; and a person who provides consumer reports in connection with:
 - a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,

- b. Information for employment purposes,
 - c. Information for the underwriting of insurance involving the consumer,
 - d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or
 - e. A legitimate business need for the information in connection with a business transaction involving the consumer;
- (4) An attorney at law licensed to practice in North Carolina while engaged in such practice and his agent, provided said agent is performing duties only in connection with his master's practice of law;
 - (5) The legal owner or lien holder, and his agents and employees, of personal property which has been sold in a transaction wherein a security interest in personal property has been created to secure the sales transaction, who engage in repossession of said personal property;
 - (6) Company police or railroad police as defined in Chapter 74A of the General Statutes of North Carolina;
 - (7) Repealed by Session Laws 1981, c. 807, s. 1.
 - (8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job in and/or for that person, firm, association, or corporation and, while performing such job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee.
 - (9) A person engaged in an alarm systems business subject to the provisions of Chapter 74D of the General Statutes of North Carolina. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2; 1981, c. 807, ss. 1-3; 1983, c. 259; c. 786, ss. 2, 3; c. 794, s. 1.)

Effect of Amendments. — The 1981 amendment added the third sentences in both subdivision (a)(1) and subdivision (a)(4), and repealed subdivision (b)(7), which read: "Persons, firms, associations, or corporations operating under a motor carrier permit or certificate issued by the North Carolina Utilities Commission; or."

The first 1983 amendment, effective May 5, 1983, in subdivision (a)(5) inserted "the" preceding "detection of deception" and added the language beginning "or any person who reviews" thereafter.

The second 1983 amendment, effective Jan. 1, 1984, deleted subdivision (2) of subsection (a), which defined the term "alarm system business" and added subdivision (9) of subsection (b).

The third 1983 amendment, effective July 18, 1983, inserted the language beginning "except that if" and ending "provisions of G.S. 74C-13 shall apply" in the next-to-last sentence of subdivision (6) of subsection (a).

Legal Periodicals. — For comment, "The Polygraph: Perceiving or Deceiving Us"? see 13 N.C. Cent. L.J. 84 (1981).

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(b) The Board shall consist of 10 members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, two persons appointed by the General Assembly upon the recommendation of the President of the Senate, one person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and three persons appointed by the General Assem-

bly upon the recommendation of the Speaker of the House of Representatives. All appointments by the General Assembly shall be subject to the provisions of G.S. 120-121, and vacancies in the positions filled by those appointments shall be filled pursuant to G.S. 120-122. Those persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives shall be licensees under this Chapter; all other appointees may not be licensees of the Board nor licensed by the Board while serving as Board members. All persons appointed shall serve terms of three years. With the exception of the Attorney General or his designated representative, no person shall serve more than six consecutive years on the Board, including years of service prior and subsequent to July 1, 1983. Board members may continue to serve until their successors have been appointed.

(1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2; 1981, c. 148, s. 1; c. 807, s. 7; 1983, c. 794, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1983, c. 794, s. 10, provides: "Schedule. It is the intent of the General Assembly to provide continuity in Board membership. Therefore, all current appointments shall expire on June 30, 1983. The following schedule of staggered terms shall apply to all new appointments: With regard to the persons appointed by the Attorney General, one shall serve a two-year term to expire on June 30, 1985, and one shall serve a three-year term to expire on June 30, 1986; the person appointed by the Governor shall serve a one-year term to expire on June 30, 1984; with regard to the persons appointed by the General Assembly upon recommendation of the President of the Senate, one shall serve a two-year term to expire on June 30, 1985, and one shall serve a three-year term to expire on June 30, 1986; the person appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall serve a one-year term to expire on June 30, 1984; and with regard to the persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one shall serve a one-year term to expire on

June 30, 1984, one shall serve a two-year term to expire on June 30, 1985, and one shall serve a three-year term to expire on June 30, 1986. Upon the expiration of each of the above appointments, the appointing authority shall appoint successors for three-year terms as specified in G.S. 74C-4(b)."

Effect of Amendments. — The first 1981 amendment substituted "10" for "eight" following "consist of" in the first sentence of subsection (b), and substituted "two" for "one" following "by the Governor" and "three" for "two" following "of the Senate and" in that sentence.

Session Laws 1981, c. 148, s. 2 provides: "The one additional appointment to be made by the Lieutenant Governor and the one additional appointment to be made by the Speaker of the House shall be made within 10 days of the effective date of this act and in a manner prescribed by Chapter 74C. The persons initially appointed pursuant to this section shall serve until July 1, 1983, and the terms of these appointments shall be for two years thereafter."

The act was ratified March 31, 1981.

The second 1981 amendment added the last sentence in subsection (b).

The 1983 amendment, effective July 18, 1983, rewrote subsection (b).

§ 74C-5. Powers of the Board.

In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to:

- (2) Determine minimum qualifications, establish and require written or oral examinations, and establish minimum education, experience, and training standards for applicants and licensees under this Chapter;
- (9) Establish rules governing detection of deception schools, and charge fees for reimbursement of costs incurred pursuant to approval of such schools. (1973, c. 528, s. 1; c. 1331, s. 3; 1979, c. 818, s. 2; 1981 (Reg. Sess., 1982), c. 1359, s. 3; 1983, c. 794, s. 2; c. 810.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment inserted a comma and "establish and require written or oral examinations," following "qualifications" in subdivision (2).

The first 1983 amendment, effective July 18,

1983, rewrote subdivision (9), which read "Establish rules governing detection of deception schools located in this State."

The second 1983 amendment, effective Jan. 1, 1984, deleted "and alarm systems schools" following "detection of deception schools" in subdivision (9) as rewritten by the first 1983 amendment.

§ 74C-8. Applications for an issuance of license.

(b) The application shall include:

- (1) Full name and business address of the applicant;
- (2) The name under which the applicant intends to do business;
- (3) A statement as to the general nature of the business in which the applicant intends to engage;
- (4) The full name and address of any partners in the business and the principal officers, directors and business manager, if any;
- (5) The names of not less than three unrelated and disinterested persons as references of whom inquiry can be made as to the character, standing, and reputation of the persons making the application;
- (6) Such other information, evidence, statements, or documents as may be required by the Board; and
- (7) Accompanying trainee permit applications only, a notarized statement signed by the applicant and his employer stating that the trainee applicant will at all times work with and under the direct supervision of a licensed private detective.

(d) Upon receipt of an application, the Board shall cause a background investigation to be made during the course of which the applicant shall be required to show that he meets all the following requirements and qualifications hereby made prerequisite to obtaining a license:

- (1) That he is at least 18 years of age;
- (2) That he is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking and/or entering, burglary, larceny, any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge and/or jury;
- (3) For a private detective license, that he has had at least three years experience within the past five years in private investigative work, or in an investigative capacity as a member of any federal law-enforcement agency, any State law-enforcement agency, any municipal law-enforcement department, or any county law-enforcement or sheriff's department. After administrative remedies have been exhausted, disputes with the board arising under G.S. 74C-8(d)(3) may be carried directly to the General Court of Justice in the county where the complainant resides.

(4) That he has the necessary training, qualifications, and/or experience in order to determine the applicant's competency and fitness as the Board may determine by rule for all licenses to be issued by the Board.

(f) Upon a finding that the application is in proper form, the completion of the background investigation, and the completion of an examination required by the Board, the Administrator shall submit to the Board the application and his recommendations. The Board shall determine whether to approve or deny the application for a license. Upon approval by the Board, a license will be issued to the applicant upon payment by the applicant of the initial license fee and the required contribution to the Private Protective Services Recovery Fund, and certificate of liability insurance. The grounds for the denial of a license include:

- (1) Commission of some act which if committed by a licensee, would be grounds for the suspension or revocation of a license under this Chapter;
- (2) Conviction of a crime involving fraud;
- (3) Lack of good moral character or temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking and/or entering, burglary, larceny; any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge and/or jury;
- (4) Previous denial of a license under this Chapter or previous revocation of a license for cause;
- (5) Knowingly making any false statement or misrepresentation in his application. (1973, c. 47, s. 2; c. 528, s. 1; 1975, c. 592, s. 1; 1977, c. 570, s. 2; 1979, c. 818, s. 2; 1983, c. 673, s. 3; c. 794, ss. 3, 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The first 1983 amendment, effective July 1, 1983, substituted "the required contribution to the Private Protective Services Recovery Fund" for "furnishing of the required cash bond or surety bond" in the third sentence of the introductory paragraph of subsection (f).

The second 1983 amendment, effective July 18, 1983, rewrote subdivision (4) of subsection (b), and rewrote the first sentence and added the second sentence of subdivision (3) of subsection (d).

Legal Periodicals. — For comment, "The Polygraph: Perceiving or Deceiving Us"? see 13 N.C. Cent. L.J. 84 (1981).

§ 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

(e) The Board is authorized to charge reasonable application and license fees as follows:

- (1) A nonrefundable initial application fee in an amount not to exceed seventy-five dollars (\$75.00);
- (2) A new or renewal license fee in an amount not to exceed two hundred fifty dollars (\$250.00);
- (3) A new or renewal trainee permit fee in an amount not to exceed two hundred fifty dollars (\$250.00);

- (4) A new or renewal fee for each license or duplicate license in addition to the basic license referred to in subsection (2) in an amount not to exceed twenty-five dollars (\$25.00);
- (5) A late renewal fee to be paid in addition to the renewal fee due in an amount not to exceed one hundred dollars (\$100.00), if the license has not been renewed on or before the expiration date of the licensee;
- (6) A new, renewal, replacement or reissuance fee for a registration identification card in an amount not to exceed thirty dollars (\$30.00);
- (7) An application fee for an armed private security officer firearm registration permit not to exceed fifty dollars (\$50.00);
- (8) A new, renewal, replacement, or reissuance fee for an armed private security officer firearm registration permit not to exceed thirty dollars (\$30.00);
- (9) An application fee for certification as a firearms trainer not to exceed fifty dollars (\$50.00);
- (10) A renewal or replacement fee for firearms trainer certification not to exceed twenty-five dollars (\$25.00);
- (11) A new nonresident temporary permit fee not to exceed one hundred dollars (\$100.00).

All fees collected pursuant to this section shall be expended, under the direction of the Board, for the purpose of defraying the expenses of administering this Chapter. All fees collected pursuant to G.S. 74B-11 which have not been expended upon the effective date of this Chapter shall be transferred to the Board established by this Chapter to be expended, under the direction of the Board, for the purpose of defraying the expenses of administering this Chapter.

(1973, c. 528, s. 1; c. 1428; 1975, c. 592, ss. 2-4; 1979, c. 818, s. 2; 1983, c. 67, s. 1; c. 794, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The first 1983 amendment, effective March 14, 1983, inserted "or duplicate license" in subdivision (e)(4) and added subdivisions (e)(6) through (e)(11).

The second 1983 amendment, effective July 18, 1983, substituted "two hundred fifty dollars (\$250.00)" for "seventy-five dollars (\$75.00)" in subdivision (e)(3).

§ 74C-10. Certificate of liability insurance required; form and approval; suspension for noncompliance.

(a) to (d) Repealed by Session Laws 1983, c. 673, s. 4, effective July 1, 1983.

(h) Every licensee shall at all times maintain on file with the Board the certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper insurance certificate.

No cancellation or refusal to renew by an insurer of a licensee under this Chapter shall be effective unless the insurer has given the insured licensee notice of the cancellation or refusal to renew. Upon termination of insurance coverage for said licensee, the insurer shall give notice to the Administrator of the Board.

(i) The Board may deny the application notwithstanding the applicant's compliance with this section:

- (1) For any reason which would justify refusal to issue or a suspension or revocation of a license; or
- (2) For the performance by applicant of any practice while under suspension for failure to keep this insurance certificate in force, for which a

license under this Chapter is required. (1973, c. 528, s. 1; 1979, c. 818, s. 2; 1981, c. 807, ss. 4, 5; 1983, c. 673, ss. 4-6, 8; c. 794, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 786, effective Jan. 1, 1984, provides in ss. 6 and 7: "Sec. 6. Any bond in effect on the effective date of this act held by a licensee pursuant to G.S. 74C-10 shall remain in effect to satisfy the bonding requirement established by G.S. 74D-9.

"Sec. 7. Any policy of liability insurance in effect on the effective date of this act held by a licensee pursuant to G.S. 74C-10 shall remain in effect to satisfy the filing of evidence of a policy of liability insurance requirement established by G.S. 74D-9."

Effect of Amendments. — The 1981 amendment rewrote the first sentence of former subsection (a), in the second sentence of former subsection (a) substituted "an applicant" for "a

licensee" and inserted "or trainee permits," and added the second paragraph in subsection (h).

Session Laws 1983, c. 673, ss. 4-6 and 8, effective July 1, 1983, deleted subsections (a) through (d), in the first paragraph of subsection (h) deleted "surety bond and" preceding "certificate of insurance required" and substituted "insurance certificate" for "bond, insurance certificate, or both" at the end of the paragraph, and in subdivision (i)(2) deleted "bond or" preceding "insurance certificate." The amendment also rewrote the catchline.

Session Laws 1983, c. 794, s. 4, effective July 18, 1983, purported to delete "surety bond or" preceding "certificate" in the first sentence of subsection (c) and to rewrite the second sentence of subsection (c). This amendment has not been effectuated since subsection (c) was repealed by Session Laws 1983, c. 673, s. 4.

§ 74C-11. Registration of persons employed; temporary employment.

(d) A security guard, watchman, or patrol personnel shall make application to the Administrator for a registration card which the Administrator shall issue to said applicant after receipt of the information required to be submitted by his employer pursuant to subsection (a), and after meeting any additional requirements which the Board, in its discretion, deems to be necessary. The security guard registration card shall be in the form of a pocket card designed by the Board, shall be issued in the name of the applicant, and shall have the applicant's photograph affixed thereto. The security guard registration card shall expire two years after its date of issuance and shall be renewed every two years. If a registered security guard changes employment to another security guard and patrol company, the security guard registration card shall remain valid.

(1979, c. 818, s. 2; 1983, c. 67, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective March 14, 1983, deleted the last sentence of subsection (d), which authorized the Board to charge a fee for initial registration and a renewal fee.

§ 74C-12. Suspension or revocation of licenses; appeal.

(a) The Board may, after compliance with Chapter 150A of the General Statutes, suspend or revoke a license issued under this Chapter if it is determined that the licensee has:

- (1) Made any false statement or given any false information in connection with any application for a license or trainee permit or for the renewal or reinstatement of a license or trainee permit;
- (2) Violated any provision of this Chapter;
- (3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;

- (4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
 - (5) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions;
 - (6) Engaged in or permitted any employee to engage in a private protective services business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
 - (7) Willfully failed or refused to render to a client service or a report as agreed between the parties and for which compensation had been paid or tendered in accordance with the agreement of the parties;
 - (8) Knowingly made any false report to the employer or client for whom information is being obtained;
 - (9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
 - (10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;
 - (11) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
 - (12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;
 - (13) To issue, deliver, or utter any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;
 - (14) Failure to make the required contribution to the Private Protective Services Recovery Fund or to maintain the certificate of liability insurance required by this Chapter;
 - (15) Violation of the firearm provisions set forth in this Chapter;
 - (16) Committed any act prohibited under G.S. 74C-16;
 - (17) Failure to notify the administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter;
 - (18) Failure to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;
 - (19) Any judgment of incompetency by a court having jurisdiction under Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.
- (1979, c. 818, s. 2; 1981, c. 807, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "compliance with Chapter 150A of the General Statutes" for "notice and an opportunity for hearing" in the introductory clause of subsection (a).

The 1983 amendment, effective July 1, 1983, rewrote subdivision (a)(14), which read "Failure to maintain the cash bond, surety bond, or certificate of liability insurance required by this Chapter."

§ 74C-13. Firearms.

(c) The applicant for an armed private security officer firearm registration permit shall submit an application to the Board on a form provided by the Board.

(d) Each armed private security officer firearm registration permit issued under this section shall be in the form of a pocket card designed by the Board and shall identify the contract security company or proprietary security organization by whom the holder of the firearm registration permit is employed. An armed private security officer firearm registration permit expires one year after the date of its issuance and must be renewed annually unless the permit holder's employment terminates before the expiration of the permit.

(k) All fees collected pursuant to G.S. 74C-13(c) and (d) shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering the firearms provisions of this Chapter. (1979, c. 818, s. 2; 1983, c. 67, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective March 14, 1983, deleted the last

sentence of subsection (c), relating to an initial application fee, the last sentence of subsection (d), relating to a renewal fee, and the last sentence of subsection (k), relating to a fee to cover expenses of administering firearms provisions.

§ 74C-16. Prohibited acts.

(e) No licensee shall hold himself out as employed by or licensed by the State Bureau of Investigation. (1979, c. 818, s. 2; 1983, c. 794, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 18, 1983, added subsection (e).

§ 74C-17. Enforcement.

(c) In lieu of revocation or suspension of a license under G.S. 74C-12, a civil penalty of not more than two thousand dollars (\$2,000) may be assessed by the Board against any person or business who violates any provision of this Chapter or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation.

(d) Proceedings for the assessment of civil penalties under this section shall be governed by Chapter 150A of the General Statutes. If the person assessed a civil penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1979, c. 818, s. 2; 1983, c. 794, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 18, 1983, added subsections (c) and (d).

§ 74C-18. Reciprocity; temporary permit.

(b) The administrator, in his discretion and subject to the approval of the Board, may issue a temporary permit to a nonresident who has complied with the provisions of G.S. 74C-10 and who is validly licensed in another state to engage in a private protective service activity incidental to a specific case originating in another state. A temporary permit may be issued for a period of no more than 30 days and may be renewed. A temporary permit may contain such restrictions which the Board, in its discretion, deems appropriate. (1979, c. 818, s. 2; 1983, c. 67, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective March 14, 1983, deleted the last sentence of subsection (b), relating to a fee for a nonresident temporary permit.

§ 74C-20: Repealed by Session Laws 1983, c. 673, s. 9, effective July 1, 1983.

§§ 74C-21 to 74C-29: Reserved for future codification purposes.

ARTICLE 2.

Private Protective Services Recovery Fund.

§ 74C-30. Private Protective Services Recovery Fund created; payments to Fund; management; use of funds.

(a) There is hereby created and established a special fund to be known as the "Private Protective Services Recovery Fund" (hereinafter Fund) which shall be set aside and maintained in the Office of the State Treasurer. Said Fund shall be used in the manner provided in this Article for the payment of claims where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any person licensed under this Chapter.

(b) Nothing contained in this Article shall limit the authority of the Board to take disciplinary action against any licensee or trainee under this Chapter, nor shall the repayment in full or all obligations to the Fund by any licensee or trainee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter.

(c) In addition to the fees provided for elsewhere in this Chapter, the Board shall charge the following fees which shall be deposited into the Fund:

- (1) On July 1, 1983, the Board shall charge every licensee and trainee possessing a license or trainee permit on that date a one-time fee of fifty dollars (\$50.00);
- (2) The Board shall charge each new applicant for a licensee or trainee permit fifty dollars (\$50.00), provided that for purposes of this Article a new applicant is hereby defined as an applicant who did not possess a license or trainee permit on July 1, 1983; and
- (3) The Board is authorized to charge each licensee and trainee an additional amount, not to exceed fifty dollars (\$50.00), on July 1 of any year in which the balance of the Fund is less than one hundred thousand dollars (\$100,000), provided that any amount so assessed will be only so much as is needed to raise the level of the Fund to one hundred thousand dollars (\$100,000), provided further that no such

assessment shall be made until after such time as the Fund initially reaches a level of one hundred thousand dollars (\$100,000) from funds collected pursuant to subdivisions (1) and (2) of this subsection.

(d) The State Treasurer shall invest and reinvest the moneys in the Fund in a manner provided by law, provided that sufficient liquidity shall be maintained to satisfy claims authorized by the Board. The proceeds from such investments shall be deposited to the credit of the Fund. The Board in its discretion, may use any and all of the proceeds from such investments for any of the following purposes:

- (1) To advance education and research in the private protective services field for the benefit of those licensed under the provisions of this Chapter and for the improvement of the industry;
- (2) To underwrite educational seminars, training centers and other educational projects for the use and benefit generally of licensees and trainees; and
- (3) To sponsor, contract for and to underwrite any and all additional educational training and research projects of a similar nature having to do with the advancement of the private protective services field in North Carolina. (1983, c. 673, s. 2.)

Editor's Note. — Session Laws 1983, c. 673, s. 10, makes this Article effective July 1, 1983.

§ 74C-31. Application for payment out of Fund; hearing grounds.

(a) The Fund shall serve as a guaranty for the obligations of those licensed under this Chapter. The Fund's liability, as guaranty, is contingent upon a licensee or trainee defaulting upon an obligation owed to a person by the licensee or trainee where said obligation was entered into by the licensee or trainee within the scope of the licensee's or trainee's employment in providing private protective services.

(b) An aggrieved party may petition the Board for a hearing to determine whether or not a licensee or trainee defaulted upon an obligation owed to the aggrieved party by the licensee or trainee; whether, if such an obligation is found, it arose within the licensee's or trainee's scope of employment while providing private protective services; and if so, the amount of damages suffered by the aggrieved party. Said hearing shall be governed by the procedures of Chapter 150A of the General Statutes.

(c) Claims filed under this Chapter may only be brought for obligations incurred on or after July 1, 1983.

(d) Until such time as the Fund reaches one hundred thousand dollars (\$100,000), or at any time the Fund has insufficient assets in excess of one hundred dollars (\$100,000) to pay outstanding claims, the State Treasurer shall not disburse any payments to an aggrieved party. However, any party aggrieved and awarded payment as ordered by the Board which order is dated after July 1, 1983, shall hold a vested right for payment plus interest as provided in G.S. 24-1 once the Fund reaches a sufficient level for payments. Authorized payments which cannot be made due to the lack of funds will be paid as funds become available, beginning with those payments which have been unsatisfied for the longest period of time.

(e) Hearings held pursuant to this Article shall be separate and apart from any hearings authorized pursuant to Article 1 of this Chapter. However, there is no prohibition against, if the Board so desires, holding hearings pursuant to Article 1 and Article 2 at the same location, on the same date, or in front of the same hearing officer provided that in so doing no provisions of Chapter 150A of the General Statutes are violated. (1983, c. 673, s. 2.)

§ 74C-32. Order directing payment out of Fund.

If the Board finds, after a hearing pursuant to G.S. 74C-31, that the Fund, as guarantor, should make a payment to an aggrieved party, the Board shall enter an order directed to the State Treasurer authorizing payment from the Fund of whatever sum the Board shall find to be payable in accordance with the limitations contained in this Article. (1983, c. 673, s. 2.)

§ 74C-33. Maximum liability; pro rata distribution.

(a) Payments from the Fund shall be subject to the following limitations:

- (1) The Fund shall not be liable for more than five thousand dollars (\$5,000) per obligation regardless of the number of persons aggrieved; and
- (2) The liability of the Fund shall not exceed in the aggregate ten thousand dollars (\$10,000) for any one licensee or trainee within a single calendar year.

(b) If the maximum liability of the Fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same obligation or to the same licensee or trainee, the amount for which the Fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the Board deems equitable. Upon action of the Board or parties, the Board may require all claimants and prospective claimants to be joined in one action to the end that the respective rights of all such claimants to the Fund may be equitably adjudicated and settled. (1983, c. 673, s. 2.)

Chapter 74D.

Alarm Systems Licensing Act.

Sec.

- 74D-1. Title.
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§ 74D-1. Title.

This act may be cited as the "Alarm Systems Licensing Act." (1983, c. 786, s. 1.)

Editor's Note. — Session Laws 1983, c. 786, s. 10, makes this Chapter effective Jan. 1, 1984.

Session Laws 1983, c. 786, ss. 4, 5 and 8, provide:

"Sec. 4. When the Alarm Systems Licensing Board is established and members are appointed as provided by G.S. 74D-4, the secretary or an agent of the board shall request all records in the possession of the Private Protective Services Board pertaining to persons licensed and registered by the Private Protective Services Board in the alarm systems business, and the Administrator of said board shall deliver such records to the secretary or agent. This section shall not apply to records and evidence collected and compiled by the Director of the State Bureau of Investigation and his assistants.

"Sec. 5. All persons licensed as alarm systems business licensees and persons registered under such licensees pursuant to the provisions

of Chapter 74C of the General Statutes of North Carolina shall have such licensure and registration transferred from the Private Protective Services Board to the Alarm Systems Licensing Board as of the effective date of this act. Such licenses and registrations shall remain in effect until the expiration date appearing on the face of the license or registration. All new and renewal licenses and registrations shall be subject to the provisions of this act on the effective date of this act."

"Sec. 8. The administration and operation of the board shall be the responsibility of the Department of Justice, which may allocate funds from income created by alarm systems business licensing to carry out the requirements of this act until the board becomes financially self-sustaining. All prior fees paid by licensees shall be credited to fees due under this act, prorated on a quarter-year basis."

§ 74D-2. Licenses required.

(a) No person, firm, association or corporation shall engage in an alarm systems business without first being licensed in accordance with this act. For purposes of this Chapter an "alarm systems business" is defined as any person, firm, association or corporation which installs, services, monitors or responds to electrical, electronic or mechanical alarm signal devices, burglar alarms, television cameras or still cameras used to detect burglary, breaking or entering, intrusion, shoplifting, pilferage, or theft, for a fee or other valuable consideration.

(b) Any person in possession of a valid Alarm Systems Business License issued under Chapter 74C of the General Statutes before the enactment of this Chapter shall be issued an appropriate substitute license under this Chapter.

(c) A business entity other than a sole proprietorship shall not do business under this Chapter unless the business entity has in its employ a designated qualifying agent who meets the requirements for a license issued under this Chapter and who is in fact licensed under the provisions of this Chapter. For the purposes of this Chapter, a "qualifying agent" means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the board. In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the board within 10 working days. The business entity must obtain a substitute qualifying agent within 30 days after the original qualifying agent ceases to serve as qualifying agent unless the board, in its discretion, extends this period for good cause for a period of time not to exceed three months. The license certificate shall list the name of at least one designated qualifying agent.

(d) Upon receipt of an application, the board shall cause a background investigation to be made during which the applicant shall be required to show that he meets all the following requirements and qualifications prerequisite to obtaining a license:

- (1) That the applicant is at least 18 years of age;
- (2) That the applicant is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary, larceny, or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge or jury;
- (3) That the applicant has the necessary training, qualifications and experience to be licensed.

(e) The board may require the applicant to demonstrate his qualifications by oral or written examination, or both. (1983, c. 786, s. 1.)

§ 74D-3. Exemptions.

The provisions of this Chapter shall not apply to:

- (1) A person or business which sells or manufactures alarm systems, unless such person or business installs, services or responds to alarm systems and thereby obtains knowledge of specific applications;
- (2) Installation, servicing or responding to fire alarm systems or any alarm device which is installed in a motor vehicle, aircraft or boat;
- (3) Installation of an alarm system on property owned by or leased to the installer; and
- (4) An alarm monitoring company located in another state which does not conduct any business through a personal representative present in this State but which solicits and conducts business solely through interstate communication facilities such as telephone messages, earth satellite relay stations and the United States postal service. (1983, c. 786, s. 1.)

§ 74D-4. Alarm Systems Licensing Board established; members; terms; vacancies; compensation; officers; meetings.

(a) The Alarm Systems Licensing Board is hereby established.

(b) The Board shall consist of five members: the Attorney General or his designee; one person appointed by the Governor who shall be licensed under this Chapter; one person appointed by the Governor who shall be a public member; one person appointed by the General Assembly upon the recommendation of the Lieutenant Governor under G.S. 120-121 who shall be licensed under this Chapter; and one person appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121 who shall be a public member.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is installed. No member shall serve more than two complete consecutive terms. The initial appointments shall be made by October 1, 1983. By October 1, 1986, the General Assembly shall appoint upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121 a successor to its licensed appointment who also shall be licensed under this Chapter and shall appoint upon the recommendation of the Lieutenant Governor under G.S. 120-121 a successor to its public appointment who also shall be a public member. Every three years thereafter the recommendation of the Lieutenant Governor and of the Speaker of the House of Representatives with respect to the licensed and public status of the persons they recommend shall continue likewise to alternate.

(d) A vacancy on the Board shall be filled for the unexpired term by the original appointing authority. Vacancies in legislative appointments shall be filled under G.S. 120-122. A vacancy may be created by removal of a Board member, either at the pleasure of the original appointing authority or by the remaining members of the Board for misconduct, incompetence or neglect of duty. A Board member may only be removed by remaining board members pursuant to a hearing at which the member subject to removal has an opportunity to be heard.

(e) Compensation, per diem and reimbursement for Board members shall be as provided in G.S. 93B-5, except that Board members who are also State or full-time salaried public officers or employees shall only receive the travel allowances set forth in G.S. 138-6.

(f) The Board shall have a chairman, who shall be appointed by the Governor and shall serve at his pleasure.

(g) The Board shall meet at the call of the chairman or a majority of the members of the Board. The Board shall adopt rules governing the call and conduct of its meetings. A majority of the current Board membership constitutes a quorum. (1983, c. 786, s. 1.)

§ 74D-5. Powers of the Board.

(a) In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to:

- (1) Promulgate rules necessary to carry out and administer the provisions of this Chapter including the authority to require the submission of reports and information by licensees under this Chapter;
- (2) Determine minimum qualifications and establish minimum education, experience, and training standards for applicants and licensees under this Chapter;
- (3) Conduct investigations regarding alleged violations and make evaluations as may be necessary to determine if licensees and registrants

under this Chapter are complying with the provisions of this Chapter;

- (4) Adopt and amend bylaws, consistent with law, for its internal management and control;
- (5) Investigate and approve individual applicants to be licensed or registered according to this Chapter;
- (6) Deny, suspend, or revoke any license issued or to be issued under this Chapter to any applicant or licensee who fails to satisfy the requirements of this Chapter or the rules established by the Board. The denial, suspension, or revocation of such license shall be in accordance with Chapter 150A of the General Statutes of North Carolina;
- (7) Issue subpoenas to compel the attendance of witnesses and the production of pertinent books, accounts, records, and documents. The district court shall have the power to impose punishment pursuant to G.S. 5A-21 et seq. for acts occurring in matters pending before the Board which would constitute civil contempt if the acts occurred in an action pending in court.

(b) The chairman of the Board or his representative designated to be a hearing officer may conduct any hearing called by the board for the purpose of denial, suspension, or revocation of a license or registration under this Chapter. (1983, c. 786, s. 1.)

§ 74D-6. Denial of a license.

Upon a finding that the applicant meets the requirements of G.S. 74D-2(d) and (e), the Board shall determine whether the applicant shall receive a license. The grounds for denial of a license include:

- (1) Commission of some act which, if committed by a licensee, would be grounds for the suspension or revocation of a license under this Chapter;
- (2) Conviction of a crime involving fraud;
- (3) Lack of good moral character or temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking or entering, burglary or larceny or of any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge or jury;
- (4) Previous denial of a license under this Chapter or previous revocation of a license for cause;
- (5) Knowingly making any false statement or misrepresentation in the license application. (1983, c. 786, s. 1.)

§ 74D-7. Form of license; term; assignability; renewal; posting; branch offices; fees.

(a) The license when issued shall be in such form as may be determined by the Board and shall state:

- (1) The name of the licensee;
- (2) The name under which the licensee is to operate; and
- (3) The number and expiration date of the license.

(b) The license shall be issued for a term of one year. Each license must be renewed before expiration of the term of the license. Following issuance, the license shall at all times be posted in a conspicuous place in the principal place of business of the licensee. A license issued under this Chapter is not assignable.

(c) No licensee shall engage in any business regulated by this Chapter under a name other than the licensee name which appears on the certificate issued by the Board or the name of a business entity which the licensee has registered with the Board.

(d) Any branch office of an alarm systems business shall be properly licensed. A separate license, stating the location and licensed qualifying agent, shall be posted at all times in a conspicuous place in each branch office. Every business covered under the provisions of this Chapter shall file in writing with the Board the addresses of each of its branch offices, if any, within 10 working days after the establishment, closing, or changing of the location of any branch office. A licensed qualifying agent may be responsible for more than one office, in the discretion of the Board.

(e) The Board is authorized to charge reasonable application and license fees as follows:

- (1) A nonrefundable initial application fee in an amount not to exceed seventy-five dollars (\$75.00);
- (2) A new or renewal license fee in an amount not to exceed one hundred fifty dollars (\$150.00);
- (3) A late renewal fee to be paid in addition to the renewal fee due in an amount not to exceed one hundred dollars (\$100.00), if the license has not been renewed on or before the expiration date of the license.
- (4) A registration fee in an amount not to exceed fifteen dollars (\$15.00) plus any fees charged to the board for background checks by the State Bureau of Investigation;
- (5) A fee for reregistration of an employee who changes employment to another licensee, not to exceed ten dollars (\$10.00).

All fees collected pursuant to this section shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering this Chapter. (1983, c. 786, s. 1.)

§ 74D-8. Registration of persons employed; temporary employment.

(a) All licensees, upon or before the beginning of employment of an employee, shall furnish the Board with the following: two sets of classifiable fingerprints on standard F.B.I. applicant cards; two recent photographs of acceptable quality for identification; and statements of any criminal records obtained from county sheriff, chief of police, or clerk of superior court in each county in North Carolina where the employee has resided within the immediately preceding 24 months.

(b) The Board shall be notified in writing of the termination of any employee registered under this Chapter within 10 days after the termination.

(c) The Board shall issue an identification card to each employee of a licensee who is registered under this Chapter. The registration card shall expire one year after its date of issuance and shall be renewed before the expiration of the term of the registration. If a registered person changes employment to another licensee, the registration card may remain valid; however, persons changing employment must pay the fee authorized by G.S. 74D-7(e)(5). (1983, c. 786, s. 1.)

§ 74D-9. Bond and certificate of liability insurance required; form and approval; action on bonds; suspension for noncompliance.

(a) No licensee or applicant for a license shall be licensed under this Chapter unless the licensee or applicant for a license files with the Board and maintains a surety bond executed by a surety company authorized to do business in this State in a sum of not less than five thousand dollars (\$5,000) or a cash bond, in lieu of the surety bond in a sum of not less than five thousand dollars (\$5,000), to protect the public from the wrongful or illegal acts of the bond principal or his agents operating in the course and scope of his or her agency.

(b) The bond shall be taken in the name of the people of the State of North Carolina. Every person injured by wrongful or illegal acts of the principal or his agents operating in the course and the scope of his or her agency may bring an action on the bond in his or her name to recover damages suffered by reason of such wrongful act. Provided, however, the aggregate liability of the surety for all breaches of the condition of bond shall, in no event, exceed the sum of said bond.

(c) The surety on the bond shall have a right to cancel such bond upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the bond which accrued prior thereto. The bond shall be approved by the board as to form, execution, and sufficiency of the sureties thereon.

(d) No license shall be issued under this act unless the applicant files with the Board evidence of a policy of liability insurance which policy must provide for the following minimum coverage: fifty thousand dollars (\$50,000) because of bodily injury or death of one person as a result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his employment; subject to said limit for one person, one hundred thousand dollars (\$100,000) because of bodily injury or death of two or more persons as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency; twenty thousand dollars (\$20,000) because of injury to or destruction of property of others as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency.

(e) An insurance carrier shall have the right to cancel such policy of liability insurance upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the policy which accrued prior thereto. The policy of liability shall be approved by the Board as to form, execution, and terms thereon.

(f) Every licensee shall at all times maintain on file with the Board the surety bond and certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper bond, insurance certificate, or both. (1983, c. 786, s. 1.)

Editor's Note. — Session Laws 1983, c. 786, effective Jan. 1, 1984, provides in ss. 6 and 7: "Sec. 6. Any bond in effect on the effective date of this act held by a licensee pursuant to G.S. 74C-10 shall remain in effect to satisfy the bonding requirement established by G.S. 74D-9.

"Sec. 7. Any policy of liability insurance in effect or the effective date of this act held by a licensee pursuant to G.S. 74C-10 shall remain in effect to satisfy the filing of evidence of a policy of liability insurance requirement established by G.S. 74D-9."

§ 74D-10. Suspension or revocation of licenses; appeal.

(a) The Board may, after notice and an opportunity for hearing, suspend or revoke a license issued under this Chapter if it is determined that the licensee has:

- (1) Made any false statement or given any false information in connection with any application for a license or for the renewal or reinstatement of a license;
- (2) Violated any provision of this Chapter;
- (3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;
- (4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
- (5) Failed to correct business practices or procedures that have resulted in prior reprimands by the Board;
- (6) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions;
- (7) Engaged in or permitted any employee to engage in any alarm systems business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
- (8) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
- (9) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
- (10) Failure to maintain the cash bond, surety bond, or certificate of liability required by this Chapter;
- (11) Any judgment of incompetency by a court having jurisdiction under Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.

(b) The revocation or suspension of a license by the Board as provided in subsection (a) shall be in writing, stating the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from such decision as provided in Chapter 150A of the General Statutes. (1983, c. 786, s. 1.)

§ 74D-11. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the Superior Court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a misdemeanor and punishable by a fine of up to five hundred dollars (\$500.00), by imprisonment for a term not to exceed one year, or by both, in the discretion of the court. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) The regulation of alarm systems businesses shall be exclusive to the Board; however, any city or county shall be permitted to require an alarm systems business operating within its jurisdiction to register and to supply information regarding its license, and may adopt an ordinance to require users of alarm systems to obtain revocable permits when alarm usage involves

automatic signal transmission to a law-enforcement agency. (1983, c. 786, s. 1.)

§ 74D-12. Severability.

If any provision of this Chapter or the application thereof to any person or circumstance is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article [sic] which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable. (1983, c. 786, s. 1.)

§ 74D-13. Transfer of funds.

All fees collected pursuant to Chapter 74C of the General Statutes from alarm systems businesses which have not been expended upon January 1, 1984, shall be transferred to the Board by the Private Protective Services Board for the purpose of defraying the expenses of administering this act. (1983, c. 786, s. 1.)

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

Sec.

75-1. Combinations in restraint of trade illegal.

75-15.2. Civil penalty.

75-16.1. Attorney fee.

75-33. Representation of eligibility to win a prize.

Article 2.

Prohibited Acts by Debt Collectors.

Sec.

75-56. Application.

ARTICLE 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy shall be guilty of a Class H felony. (1913, c. 41, s. 1; C. S., s. 2559; 1981, c. 764, s. 2.)

Cross References. —

As to illegal combinations in restraint of trade by contractors, subcontractors, and suppliers in dealing with governmental agencies, see §§ 133-23 through 133-33.

Effect of Amendments. — The 1981 amendment substituted "Class H felony" for a clause making a violation of the section a misdemeanor and providing punishments therefor. Session Laws 1981, c. 764, s. 4, provides: "This act shall become effective 60 days after ratification and shall be prospective in its application." The act was ratified July 2, 1981.

Session Laws 1981, c. 764, s. 3 contains a severability clause.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For note, "The Need for Antitrust Legislation Tailored to the Specific Concerns of Bank-Nonbank Director Interlocks," see 1982 Duke L.J. 938.

CASE NOTES

I. GENERAL CONSIDERATION.

The common law on restraint of trade, etc. —

In accord with original. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

This section was based, etc. —

In accord with 1st paragraph in original. See *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal

dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Law Applying Sherman Act, etc. —

In accord with original. See *Hester v. Martindale-Hubbell, Inc.*, 493 F. Supp. 335 (E.D.N.C. 1980), aff'd, 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982); *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Law of Civil Conspiracy Is Applicable. — This State's substantive law of civil conspiracy also applies in the context of this section. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Applied in *Simmons v. C.W. Myers Trading Post, Inc.*, 307 N.C. 122, 296 S.E.2d 294 (1982); *Angola Farm Supply & Equip. Co. v. FMC Corp.*, 59 N.C. App. 272, 296 S.E.2d 503 (1982).

Cited in *Ratliff v. Burney*, 505 F. Supp. 105 (W.D.N.C. 1981); *Lloyd v. Carnation Co.*, — N.C. App. —, 301 S.E.2d 414 (1983).

II. WHAT COMBINATIONS AND CONTRACTS ILLEGAL.

Impact on Competitive Conditions Proper Focus. — The proper focus is not whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so was not in violation of this section and § 75-1.1. See *Hester v. Martindale-Hubbell, Inc.*, 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982).

III. PLEADING AND PRACTICE.

Elements of Trade Conspiracy. — The

substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Concerted Action Must be Proven. — The plain language of this section requires that some concerted action in restraint of trade must be proven; unilateral action cannot violate the statute. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Direct proof of an express agreement is not required. On the contrary, the plaintiff may rely on an inference of a common understanding drawn from circumstantial evidence. Nevertheless, plaintiff has the burden of adducing sufficient evidence from which the jury could find illegal concerted action on the basis of reasonable inferences and not mere speculation. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Burden of Proving Unreasonableness, etc. —

In accord with original. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Cross References. — As to remedies to prevent fraud and abuse by discount buying clubs, see § 66-136.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For note on commercial reasonableness and the public sale in North Carolina, see 17 Wake Forest L. Rev. 153 (1981).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For article discussing North Carolina

antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

For a comment on landlords' eviction remedies in the light of *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 "Act to Clarify Landlord Eviction Remedies in Residential Tenancies," see 60 N.C.L. Rev. 885 (1982).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For a note concerning intent under North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

CASE NOTES

I. GENERAL CONSIDERATION.

Legislative Intent. —

In accord with 2nd paragraph in original. See *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

The purpose of the statute outlined in subsection (b) of this section makes clear that the act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce in North Carolina. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

The 1977 amendments to this section constituted a substantive revision, etc. —

In accord with 1980 Int. Supp. See *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

The 1977 amendments to this section are not to be applied retroactively. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

The federal decisions construing the Federal Trade Commission Act, etc. —

Because of the similarity in language of this section and § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), it is appropriate for the Supreme Court to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of this section. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Since the language of subsection (a) of this section is strikingly similar to that of a section of the Federal Trade Commission Act, 15 U.S.C.A. § 45(a)(1), North Carolina courts have held that federal decisions construing that act are instructive upon the meaning of this section. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Relation Between This Section and § 75-16. — As an essential element of a cause of action under § 75-16, plaintiff must prove not only a violation of this section by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Marshall v. Miller*, 302 N.C. 539, 276

S.E.2d 397 (1981); *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981).

"Unfairness" is broader than and includes the concept of "deception". *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981).

A trade practice is deceptive if it has the capacity or tendency to deceive. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

To succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981).

But proof of actual deception is not required. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Factors Determining Unfairness or Deception. — Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

In determining whether a violation of this section has occurred, the question of whether the defendant acted in bad faith is not pertinent, and the character of the plaintiff, whether public or private, should not alter the scope of the remedy. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Applied in *Hester v. Martindale-Hubbell, Inc.*, 493 F. Supp. 335 (E.D.N.C. 1980); *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 354, 285 S.E.2d 325 (1982); *Santana, Inc. v. Levi Strauss & Co.*, 674 F.2d 269 (4th Cir. 1982); *Brenner v. Little Red School House, Ltd.*, 59 N.C. App. 68, 295 S.E.2d 607 (1982); *Hager v. Crawford*, — N.C. App. —, 299 S.E.2d 832 (1983).

Quoted in *Taylor v. Hayes*, 302 N.C. 627, 276 S.E.2d 369 (1981); *MAS Corp. v. Thompson*, — N.C. App. —, 302 S.E.2d 271 (1983).

Stated in *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982).

Cited in *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 266 S.E.2d 658 (1980); *Twin City Apts., Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E.2d 323 (1980); *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E.2d 9 (1980); *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 266 S.E.2d 14 (1980); *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980); *Vickery v. Olin Hill Constr. Co.*, 47 N.C. App. 98, 266 S.E.2d 711 (1980); *Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980); *North Carolina Dept of Cor. v. Gibson*, 58 N.C. App. 241, 293

S.E.2d 664 (1982); *Lloyd v. Carnation Co.*, — N.C. App. —, 301 S.E.2d 414 (1983); *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982); *Ransom v. Blair*, — N.C. App. —, 302 S.E.2d 306 (1983); *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712 (4th Cir. 1983).

II. SCOPE OF SECTION.

Trade or Commerce Context Prerequisite. — Before a practice can be declared unfair or deceptive under this section, it must first be determined that the practice or conduct which is complained of takes place within the context of this section's language pertaining to trade or commerce. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

"Commerce" Comprehends an Exchange. — The use of the word "trade" interchangeably with the word "commerce" indicates that this section contemplated a narrower definition of commerce which would comprehend an exchange of some type. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Rental of spaces in a mobile home park is "trade and commerce" within the meaning of this statute. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980), modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981).

The rental of commercial property is trade or commerce within the meaning of this section. *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

Padlocking Premises upon Failure to Pay Rent. — The practices of defendant landlord in padlocking premises when tenants failed to pay rent did not constitute unfair trade practices under this section. *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981).

Employer-Employee Relationships. — Unlike buyer-seller relationships, the employer-employee relationships do not fall within the intended scope of this section. *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 289 S.E.2d 118, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

The relationship of borrower and mortgage broker and the activities which are appurtenant to it are components of the larger concept of trade or commerce and therefore come within the purview of this section, though no tangible property of any kind moves through commerce because of this relationship, since an exchange of value does occur as a result of the process of securing a broker as the representative of the potential borrower. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Agreement to Prevent Performance of Contract to Purchase Condominium. — Plaintiff's complaint stated a claim for relief against defendant bank and defendant mortgage lender for civil conspiracy and treble damages under the unfair trade practices statute where it alleged that plaintiffs contracted with defendant bank to purchase a condominium; pursuant to the terms of the contract, plaintiffs applied for a loan to defendant lender to finance the purchase of the condominium; defendant bank thereafter determined it did not want to perform the contract and made an agreement with defendant lender by which defendant lender would not make a loan to plaintiffs to finance the purchase and would not notify plaintiffs of the loan refusal until it was too late for plaintiffs to secure alternate financing; and defendant lender, in furtherance of this agreement, refused to make the loan, not because of a legitimate business reason, but in order to prevent plaintiffs from performing their part of the contract. *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 275 S.E.2d 565 (1981).

Section Applicable to "Sellers". — The unfair and deceptive acts and practices forbidden by subsection (a) of this section are those involved in the bargain, sale, barter, exchange or traffic. This view is reinforced by subsection (b) of this section, a declaration of legislative intent having no counterpart in the federal act. The General Assembly, thus, is concerned with openness and fairness in those activities which characterize a party as a "seller." *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Medical professionals are not "sellers" whose unfair and deceptive acts and practices are forbidden by this section. *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

Unfair and deceptive acts and practices in the insurance industry are not regulated exclusively by the insurance statutes, § 58-54.1 et seq., and may constitute the basis of recovery under this section. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Misbranding Constituted Deceptive Practice As Matter of Law. — Defendant's failure properly to label drums of antifreeze constituted a misbranding under former § 106-571(2), and such misbranding was a deceptive practice within the meaning of this section as a matter of law. *State ex rel. Edmisten v. Zim Chem. Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair

competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was carefully negotiated and drawn by sophisticated parties; and where there was no hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of § 75-1.1 simply because the breach was intentional and not properly disclosed. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Conduct Not Amounting to Unfair Trade Practice. — In an action to recover from defendant who had been given the exclusive right to negotiate a permanent loan for plaintiff partners to construct a shopping center, defendant mortgage broker did not engage in any conduct which would amount to an unfair trade practice where defendant was at all times cooperative, doing what it could as an intermediary with defendant lender so as to secure for plaintiff partnership the terms and modifications it desired to have; as a result of defendant broker's efforts there was no difficulty posed in obtaining the consent of defendant lender for substitution of tenants; there was no evidence that defendant broker exerted itself in any manner which would have contributed to the problem of securing tenants for plaintiff's shopping center; and there was no evidence that defendant broker had anything to do with the construction lender's withdrawal from the shopping center project. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

So That Summary Judgment Proper. — The trial court did not err in granting defendant mortgage broker's motion for summary judgment as to plaintiff's claim for relief based on a deceptive trade practice where nothing in the depositions or affidavits supported the view that statements by defendant's employee were

deceptive, and defendant at all times undertook to keep plaintiff partnership accurately and clearly informed of the state of affairs concerning the loan commitment from defendant lender. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

Activities Insufficient to "Surround" or "Affect" Sale. — Where the actions alleged to be unfair under this section did not change the legal obligations of the parties or cause a change in title to the assets, the activities of defendant would not "surround" or "affect" a sale. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Refusal of legal directory publisher to publish attorney's "professional card" and failure of ABA and North Carolina State Bar to prevent publisher from refusing to do so was not in violation of § 75-1 and this section. *Hester v. Martindale-Hubbell, Inc.*, 659 F.2d 433 (4th Cir. 1981), cert. denied, 455 U.S. 981, 102 S. Ct. 1489, 71 L. Ed. 2d 691 (1982).

III. PLEADING AND PRACTICE.

And Court Determines Whether Practice Violates Section. —

In accord with 1st paragraph in original. See *Whitman v. Forbes*, 55 N.C. App. 706, 286 S.E.2d 889 (1982).

Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Damages may be recovered either for breach of contract or for violation of this section, but not for both, where the same course of conduct gives rise to a traditionally recognized cause of action as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of this section. *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97, cert. denied, 301 N.C. 401, 274 S.E.2d 226 (1980), modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981).

§ 75-2. Any restraint in violation of common law included.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

CASE NOTES

Actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason," accordingly, public damage must be alleged and proven. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

Impact on Competitive Conditions

Proper Focus. — The proper focus is not whether plaintiff-victim and defendant-conspirator were in actual competition with each other, but is upon the challenged restraint's impact on competitive conditions. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1041 (E.D.N.C. 1979).

§ 75-4. Contracts to be in writing.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Cited in *Sandhill Motors, Inc. v. American Motors Sales Corp.*, 667 F.2d 1112 (4th Cir. 1981).

§ 75-5. Particular acts prohibited.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For article discussing North Carolina antitrust and consumer protection law, see 60 N.C.L. Rev. 207 (1982).

§ 75-6. Violation a misdemeanor; punishment.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-7. Persons encouraging violation guilty.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Cited in *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980).

§ 75-8. Continuous violations separate offenses.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

§ 75-9. Duty of Attorney General to investigate.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For a comment on the Landlord Eviction Remedies Act in light of *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

§ 75-10. Power to compel examination.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

§ 75-11. Person examined exempt from prosecution.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-12. Refusal to furnish information; false swearing.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-13. Criminal prosecution; district attorneys to assist; expenses.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-14. Action to obtain mandatory order.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

CASE NOTES

Proof of Actual Injury. — Public enforcement through the Attorney General is similar to Section 5 of the Federal Trade Commission Act, the purpose of which is to vindicate public interest rather than to redress individual grievances. Under the federal act, it is not necessary to show actual injury has resulted,

but merely that the act or practice complained of adversely affects the public interest, and similarly, there is no suggestion in the North Carolina statutory scheme that the Attorney General would be required to prove such actual injury. *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 284 S.E.2d 333 (1981).

§ 75-15. Actions prosecuted by Attorney General.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Applied in State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

§ 75-15.1. Restoration of property and cancellation of contract.

CASE NOTES

Unnecessary To Return Valueless Property. — It was unnecessary that the parties receiving restitution be ordered to return the drums of mislabeled and useless antifreeze to the seller, where the record clearly showed that the antifreeze had no value. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Interest on Judgment. — In an action under § 75-5 to enjoin deceptive acts and prac-

tices in the sale of antifreeze, interest on the court's judgment ordering defendant to make restoration payments to 33 customers was governed by § 24-5 and should have been awarded only from the time of entry of the judgment. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712 (4th Cir. 1983).

§ 75-15.2. Civil penalty.

In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars (\$5,000) for each violation. In any action brought by the Attorney General pursuant to this Chapter in which it is shown that an action or practice when committed was specifically prohibited by a court order, the Court may, in its discretion, impose a civil penalty of up to five thousand dollars (\$5,000) for each violation. Civil penalties may be imposed in a new action or by motion in an earlier action, whether or not such earlier action has been concluded. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so assessed shall be paid to the General Fund of the State of North Carolina. (1977, c. 747, s. 3; 1983, c. 721, s. 1.)

Effect of Amendments. — The 1983 amendment, effective July 11, 1983, deleted "specifically prohibited by a court order or" following "which constituted the violation were, when committed," in the first sentence and inserted the present second and third sentences.

Legal Periodicals. —

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For comment on the Business Opportunity Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

CASE NOTES

Applied in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712 (4th Cir. 1983).

Quoted in *Marshall v. Miller*, 302 N.C. 539,

276 S.E.2d 397 (1981).

Cited in *Marshall v. Miller*, 47 N.C. App. 530, 268 S.E.2d 97 (1980).

§ 75-16. Civil action by person injured; treble damages.

Legal Periodicals. —

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

For survey of 1980 commercial law, see 59 N.C.L. Rev. 1017 (1981).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For comment on the Business Opportunity

Sales Act of 1977, see 17 Wake Forest L. Rev. 623 (1981).

For a comment on the Landlord Eviction Remedies Act in light of *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For a note suggesting that intent is not required to award treble damages for a violation of North Carolina's Unfair or Deceptive Acts or Practices Statute, see 18 Wake Forest L. Rev. 134 (1982).

CASE NOTES

Legislative Intent. —

In enacting this section and § 75-16.1, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

While this section is punitive, it is not a penal statute. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), *aff'd*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Section Remedial as Well as Punitive. — This section is partially punitive in nature in that it clearly serves as a deterrent to future violations; but it is also remedial for other reasons, among them the fact that it encourages private enforcement and the fact that it provides a remedy for aggrieved parties. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Treble Damages Not Subject to Judicial Discretion. — The award of treble damages is a right of the successful plaintiff and is not subject to judicial discretion. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712 (4th Cir. 1983).

Intentional Breach of Contract. — In an action for breach of contract alleging unfair competition, the trial court properly denied treble damages where the defendant's violation of its contractual obligation was an intentional breach, but there was neither unfairness nor deception in formulation of the contract; where the jury found no deception in the circumstances of its breach; where the contract was carefully negotiated and drawn by sophisticated parties; and where there was no

hint of any unfairness to either party before the defendant's cessation of performance; thus, no unfairness inhered in the circumstances of the breach within the meaning of § 75-1.1 simply because the breach was intentional and not properly disclosed. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Causal Relation Issue of Fact for Jury. — Whether there be a causal relation between the violation of the statute and the injury complained of is an issue of fact for a jury. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

Actual Injury Must Be Proved. — As an essential element of a cause of action under this section, plaintiff must prove not only a violation of § 75-1.1 by the defendants, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentations. *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E.2d 271 (1980).

State Court Antitrust Consent Decree Res Judicata in Federal Court on Identical Cause of Action. — There was a sufficient identity of causes of action between a state court antitrust action and a federal district court antitrust action to support a finding of res judicata based on the consent judgment in the earlier state court action, where the two suits alleged the same operative facts and the same illegal price-fixing conspiracy, and the state and federal statutes upon which the actions were based were identical except for the interstate commerce requirement of the federal statute. *Nash County Bd. of Educ. v. Biltmore Co.*,

640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878, 102 S. Ct. 359, 70 L. Ed. 2d 188, rehearing denied, 454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654 (1981).

Applied in *Martin v. Pilot Indus.*, 632 F.2d 271 (4th Cir. 1980); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E.2d 176 (1981); *Smith v. King*, 52 N.C. App. 158, 277 S.E.2d 875 (1981).

Cited in *Hammers v. Lowe's Cos.*, 48 N.C. App. 150, 268 S.E.2d 257 (1980); *Taylor v. Hayes*, 302 N.C. 627, 276 S.E.2d 369 (1981); *Old Dominion Distribs., Inc. v. Bisette*, 56 N.C. App. 200, 287 S.E.2d 409 (1982); *American Travel Corp. v. Central Carolina Bank & Trust Co.*, 57 N.C. App. 437, 291 S.E.2d 892 (1982).

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
- (1973, c. 614, s. 1; 1983, c. 417, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Oct. 1, 1983, substituted "fully

resolve the matter" for "pay the claim" in subdivision (1).

Legal Periodicals. — For comment on the Business Opportunity Sales Act of 1977, see 17 *Wake Forest L. Rev.* 623 (1981).

CASE NOTES

Legislative Intent. — In enacting § 75-16 and this section, the legislature intended to establish an effective private cause of action for aggrieved consumers in this State. *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981).

Award of attorneys' fees pursuant to this section is not permissible where court has found that § 75-1.1 either did not apply or was not

violated. *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), aff'd, 649 F.2d 985 (4th Cir.), cert. denied, 454 U.S. 1054, 102 S. Ct. 599, 70 L. Ed. 2d 590 (1981).

Cited in *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712 (4th Cir. 1983).

§ 75-16.2. Limitation of actions.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For comment on the Business Opportunity

Sales Act of 1977, see 17 *Wake Forest L. Rev.* 623 (1981).

§ 75-17. Lender may not require borrower to deal with particular insurer.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North

Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-18. Lender may require nondiscriminatory approval of insurer.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-19. Violators subject to fine and injunction.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-27. Unsolicited merchandise.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 75-28. Unauthorized disclosure of tax information; violation a misdemeanor.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Applied in *Dixon, Odum & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

§ 75-33. Representation of eligibility to win a prize.

(a) No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for sale or lease of any goods, property or service, represent that another person, firm, and/or corporation has a chance to receive any prize or item of value without clearly disclosing on whose behalf the contest or promotion is conducted, and all material conditions which a participant must meet. Additionally, each of the following must be clearly and prominently disclosed immediately adjacent to the description of the item or prize to which it relates:

- (1) The actual retail value of each item or prize (the price at which substantial sales of the item were made in the area within the last 90 days, or if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf the contest or promotion is conducted);
- (2) The actual number of each item or prize to be awarded;
- (3) The odds of receiving each item or prize.

It shall be unlawful to make any representation of the type governed by this section, if it has already been determined which items will be given to the person to whom the representation is made.

(b) The provisions of this section shall not apply where (i) all that is asked of participants is that they complete and mail, or deposit at a local retail commercial establishment, an entry blank obtainable locally or by mail, or call in their entry by telephone, and (ii) at no time are participants asked to listen to a sales presentation.

(c) To the extent that representations of the type governed by this section are broadcast by radio or television or carried by cable-television, the required disclosures need not be made, if the required information is made available to interested persons on request without charge or cost to them.

(d) Nothing in this section shall create any liability for acts by the publisher, owner, agent or employee of a newspaper, periodical, radio station, television station, cable-television system or other advertising medium arising out of the publication or dissemination of any advertisement or promotion governed by this section, when the publisher, owner, agent or employee did not know that the advertisement or promotion violated the requirements of this section. (1979, c. 879, s. 1; 1981, c. 806; 1983, c. 721, s. 3.)

Effect of Amendments. — The 1981 amendment rewrote the former section as present subsection (a), and added subsections (b), (c), and (d).

The 1983 amendment, effective July 11, 1983, substituted "and" for "or" at the end of clause (i) of subsection (b).

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

CASE NOTES

Article Inapplicable to Case of Mistaken Identity. — For a claimant to claim protection under this Article, he must have had at least some connection with the underlying debt or alleged debt. Because of the presence of the term "incurred" in subdivision (1), the words "alleged debt" could not include an instance in which a debt collector mistakenly identified the person who owed it money or allegedly owed it money. The legislature chose not to use the words "allegedly incurred". Thus, the language

of the Article does not evidence an intent by the legislature to provide protection for a person mistakenly thought to have been the one who incurred an obligation. Such persons must rely on common-law remedies. *Fisher v. Eastern Air Lines*, 517 F. Supp. 672 (M.D.N.C. 1981).

Applied in *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981).

Cited in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

§ 75-51. Threats and coercion.

Legal Periodicals. — For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

CASE NOTES

Stated in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

§ 75-54. Deceptive representation.

CASE NOTES

Padlocking Notice Did Not Simulate Legal Process. — A padlocking notice posted by defendant landlord on the doors of tenants who were late paying their rent did not simulate legal process in violation of this section, since the notice in question contained no

signatures, no seal, no mention of an official or of a court, no date, and no reference to an amount due. *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981).

Applied in *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980).

§ 75-56. Application.

The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and 75-16, civil penalties in excess of one thousand dollars (\$1,000) shall not be imposed, nor shall damages be trebled for any violation under this Article. (1977, c. 747, s. 4; 1983, c. 417, s. 1.)

Effect of Amendments. — The 1983 amendment, effective Oct. 1, 1983, substituted "and 75-16" for "75-16, and 75-16.1" near the beginning of the second sentence and substituted "for any violation under this Article" for "or attorney's fees assessed for any violation

under this Article nor shall the provisions of this Article be construed to confer any right of private action not already available at common law or by means of other specific statutory authorization" at the end of the second sentence.

Chapter 75A

Boating and Water Safety.

Article 1.

Sec.

Boating Safety Act.

Sec.

75A-2. Definitions.

75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

75A-4. Identification numbers required.

75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; pre-

sumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

75A-5.1. Commercial fishing boats; renewal of number.

75A-7. Exemption from numbering requirements.

75A-8. Boat liveryes.

ARTICLE 1.

Boating Safety Act.

§ 75A-2. Definitions.

As used in this Chapter, unless the context clearly requires a different meaning:

- (3) "Owner" means a person, other than a lienholder, having the property in or title to a vessel. The term includes a person entitled to the use or possession of a vessel subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation, but the term excludes a lessee under a lease not intended as security. (1959, c. 1064, s. 2; 1965, c. 634, s. 1; 1969, c. 87; 1975, c. 340, s. 1; 1983, c. 446, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Jan. 1, 1984, substituted "vessel" for "motorboat" in subdivision (3).

§ 75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

(c) All moneys collected pursuant to the numbering provisions of this Chapter and pursuant to G.S. 105-446.2 shall be deposited in the State treasury and credited to a special fund known as the Wildlife Resources Fund and provided by G.S. 143-250. The said moneys shall be made available to the Wildlife Resources Commission, subject to the Executive Budget Act and the Personnel Act, for the administration and enforcement of this Article, for activities relating to boating and water safety including education and waterway marking and improvement, and for boating access area acquisition, development and maintenance all in accordance with plans approved by the Wildlife Resources Commission. Such funds are hereby appropriated, reserved, set aside, and made available to the Wildlife Resources Commission until expended for the purpose set forth in this Article. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003; 1981 (Reg. Sess., 1982), c. 1182, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, it is not set out.

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment, effective July 1, 1982, rewrote subsection (c).

§ 75A-4. Identification numbers required.

Every vessel on the waters of this State shall be numbered. No person shall operate or give permission for the operation of any vessel on such waters unless the vessel is numbered in accordance with this Chapter, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state, and unless

- (1) The certificate of number awarded to such vessel is in full force and effect, and
- (2) The identifying number set forth in the certificate of number is displayed on each side of the bow of such vessel. (1959, c. 1064, s. 4; 1983, c. 446, s. 1.)

Effect of Amendments. — The 1983 amendment, effective Jan. 1, 1984, substituted

"vessel" for "motorboat" throughout this section.

§ 75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest; abandonment, etc.; change of address; unauthorized numbers.

(a) The owner of each vessel requiring numbering by this State shall file an application for number with the Wildlife Resources Commission on forms approved by it. The application shall be signed by the owner of the vessel, or his agent, and shall be accompanied by a fee of five dollars and fifty cents (\$5.50) for a one-year period or by a fee of thirteen dollars (\$13.00) for a three-year period; provided, however, there shall be no fee charged for vessels owned and operated by nonprofit rescue squads if they are operated exclusively for rescue purposes, including rescue training. The applicant shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall have the same entered upon the records of its office and issue to the applicant a certificate of number stating the number awarded to the vessel and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the vessel the identification number in such manner as may be prescribed by rules and regulations of the Commission in order that it may be clearly visible. The number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the vessel immediately following the number. The certificate of number shall be pocket size and shall be available at all times for inspection on the vessel for which issued, whenever such vessel is in operation. Provided, however, any person charged with failing to so carry such certificate of number shall not be convicted if he produces in court a certificate of number theretofore issued to him and valid at the time of his arrest.

(b) The owner of any vessel already covered by a number in full force and effect which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state shall record the number prior to operating the vessel on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of a number under subsection (a) of this section, except that no additional or substitute number shall be issued.

(c) Should the ownership of a vessel change, a new application form with a fee of five dollars and fifty cents (\$5.50) for a one-year period or by a fee of thirteen dollars (\$13.00) for a three-year period shall be filed with the Wildlife Resources Commission and a new certificate bearing the same number shall be awarded the new owner in the manner as provided for in an original award of number. In case a certificate should become lost, a new certificate bearing the same number shall be issued upon payment of a fee of two dollars (\$2.00). Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie evidence that the person whose name appears therein is the owner of the boat referred to therein.

(d) In the event that an agency of the United States government shall have in force an over-all system of identification numbering for vessels within the United States, the numbering system employed pursuant to this Chapter by the Wildlife Resources Commission shall be in conformity therewith.

(i) The owner shall furnish the Wildlife Resources Commission notice of the transfer of all or any part of his interest other than the creation of a security interest in a vessel numbered in this State pursuant to subsections (a) and (b) of this section or of the destruction or abandonment of such vessel, within 15 days thereof. Such transfer, destruction, or abandonment shall terminate the certificate of number for such vessel except that, in the case of a transfer of a part interest which does not affect the owner's right to operate such vessel, such transfer shall not terminate the certificate of number.

(k) No number other than the number awarded to a vessel or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of such vessel, except the validation decal required by subsection (a) of this section.

(1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7; 1981, c. 161; 1983, c. 194; c. 446, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to the issuance of permanent certificates of number to motorboats owned by governmental entities and nonprofit rescue squads, see § 75A-7.

Effect of Amendments. — The 1981 amendment added the proviso at the end of the second sentence of subsection (a).

The first 1983 amendment, effective July 1,

1983, substituted "a fee of five dollars and fifty cents (\$5.50) for a one-year period or by a fee of thirteen dollars (\$13.00) for a three-year period" for "fee of two dollars (\$2.00)" and inserted "the new owner" in the first sentence of subsection (c).

The second 1983 amendment, effective Jan. 1, 1984, substituted "vessel" for "motorboat" throughout this section and "vessels" for "motorboats" in subsections (a) and (d).

§ 75A-5.1. Commercial fishing boats; renewal of number.

(b) For the purpose of this section, commercial fishing boats are defined as vessels which are used primarily for commercial fishing operations, from which operations the owners and/or operators thereof derived more than one half of their gross incomes during the preceding calendar year.

(1961, c. 469, s. 2; 1965, c. 957, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1983, c. 446, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Jan. 1, 1984, substituted "vessels" for "motorboats" in this section.

§ 75A-6. Classification and required lights and equipment; rules and regulations.

Local Modification. — Catawba, Gaston, Iredell, Lincoln, and Mecklenburg: 1983, c. 200.

§ 75A-7. Exemption from numbering requirements.

(a) A vessel shall not be required to be numbered under this Chapter if it is:

- (1) A vessel which is required to be awarded a number pursuant to federal law or a federally approved numbering system of another state, and for which a number has been so awarded: Provided, that any such boat shall not have been within this State for a period in excess of 90 consecutive days.
- (2) A vessel from a country other than the United States temporarily using the waters of this State.
- (3) A vessel whose owner is the United States, a state or a subdivision thereof.
- (4) A ship's lifeboat.
- (5) A vessel which has a valid marine document issued by the Bureau of Customs of the United States government or any federal agency successor thereto.
- (6) A sailboat of not more than 14 feet on the load water line (LWL).
- (7) A vessel with no means of propulsion other than drifting or manual paddling, poling, or rowing.

(b) The Wildlife Resources Commission is hereby empowered to permit the voluntary numbering of vessels owned by the United States, a state or a subdivision thereof.

(c) Those vessels owned by the United States, a state or a subdivision thereof and those owned by nonprofit rescue squads may be assigned a certificate of number bearing no expiration date but which shall be stamped with the word "permanent" and shall not be renewable so long as the vessel remains the property of the governmental entity or nonprofit rescue squad. If the ownership of any such boat is transferred from one governmental entity to another or to a nonprofit rescue squad or if a boat owned by a nonprofit rescue squad is transferred to another nonprofit rescue squad or governmental entity, a new permanent certificate may be issued without charge to the successor entity. When any such boat is sold to a private owner or is otherwise transferred to private ownership, the applicable certificate of number shall be deemed to have expired immediately prior to such transfer. Prior to further use on the waters of this State, the new owner shall obtain either a temporary certificate of number or a regular certificate pursuant to the provisions of this Chapter. The provisions of this subsection applicable to motorboats owned by nonprofit rescue squads apply only to those operated exclusively for rescue purposes, including rescue training. (1959, c. 1064, s. 7; 1981, c. 162; 1983, c. 446, ss. 1-3.)

Cross References. — As to allowing nonprofit rescue squads to apply for numbers without payment of a fee, see § 75A-5.

Effect of Amendments. — The 1981 amendment designated the former section as present

subsection (a), and added subsections (b) and (c).

The 1983 amendment, effective Jan. 1, 1984, substituted "vessel" for "motorboat" and "vessels" for "motorboats" throughout the sec-

tion, and added subdivisions (5), (6) and (7) to subsection (a). The act directed that subdivisions (5), (6) and (7) be placed at the end of the

section but its obvious intent was that they be placed under subsection (a).

§ 75A-8. Boat liveries.

It shall be unlawful for the owner of a boat livery to rent a vessel to any person unless the provisions of this Chapter have been complied with. It shall be the duty of owners of boat liveries to equip all vessels rented as required by this Chapter. (1959, c. 1064, s. 8; 1975, c. 340, s. 3; 1983, c. 446, s. 1.)

Effect of Amendments. — The 1983 amendment, effective Jan. 1, 1984, substituted

"vessel" for "motorboat" and "vessels" for "motorboats" in this section.

§ 75A-9. Muffling devices.

Local Modification. — Catawba, Iredell, Lincoln, and Mecklenburg (Lakes Norman,

Wylie and Mountain Island only): 1981 (Reg. Sess., 1982), c. 1266.

§ 75A-10.1. Family purpose doctrine applicable.

CASE NOTES

Cited in Moore v. Crumpton, 55 N.C. App. 398, 285 S.E.2d 842 (1982).

Chapter 76.

Navigation.

Article 1.

Cape Fear River.

Sec.

76-1 to 76-17. [Repealed.]

76-19 to 76-24. [Repealed.]

Article 6.

Morehead City Navigation and Pilotage Commission.

Sec.

76-59 to 76-73. [Repealed.]

ARTICLE 1.

Cape Fear River.

§§ 76-1 to 76-17: Repealed by Session Laws 1981, c. 910, s. 2, effective July 1, 1981.

Cross References. — For present provisions as to the Cape Fear Navigation and Pilotage Commission, see Chapter 76A.

§§ 76-19 to 76-24: Repealed by Session Laws 1981, c. 910, s. 2, effective July 1, 1981.

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

§§ 76-59 to 76-73: Repealed by Session Laws 1981, (Regular Session, 1982), c. 1176, s. 2, effective July 1, 1982.

Cross References. — For present provisions relating to the Morehead City Navigation and Pilotage Commission, see Articles 4 through 6 of Chapter 76A.

Editor's Note. — This Article was also ten-

tatively repealed by Session Laws 1977, c. 712, as amended, effective July 31, 1981, but the repeal provided for in the 1977 act was itself repealed by Session Laws 1981, c. 932, s. 1.

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 1.

General Provisions.

Sec.

- 76A-1. Commission established; powers generally.
- 76A-2. Membership.
- 76A-3. Term.
- 76A-4. Quorum.
- 76A-5. Duties and authority.
- 76A-6. Classes of licenses.
- 76A-7 to 76A-11. [Reserved.]

Article 2.

Pilots.

- 76A-12. Apprentices.
- 76A-13. Pilotage association.
- 76A-14. Number of pilots.
- 76A-15. Pilot retirement.
- 76A-16. Compulsory use of pilots.
- 76A-17. Pilotage rates.
- 76A-18. Vessels not liable for pilotage.
- 76A-19 to 76A-23. [Reserved.]

Article 3.

Commission Funds.

- 76A-24. Expenses of the Commission.
- 76A-25. Widows and Orphans Fund.
- 76A-26 to 76A-30. [Reserved.]

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

Article 4.

General Provisions.

Sec.

- 76A-31. Morehead City Navigation and Pilotage Commission.
- 76A-32. Membership.
- 76A-33. Term.
- 76A-34. Quorum.
- 76A-35. Duties and authority.
- 76A-36. Classes of licenses.
- 76A-37 to 76A-41. [Reserved.]

Article 5.

Pilots.

- 76A-42. Apprentices.
- 76A-43. Pilotage association.
- 76A-44. Number of pilots.
- 76A-45. Pilot retirement.
- 76A-46. Compulsory use of pilots.
- 76A-47. Pilotage rates.
- 76A-48. Vessels not liable for pilotage.
- 76A-49 to 76A-53. [Reserved.]

Article 6.

Commission Funds.

- 76A-54. Expenses of the Commission.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 1.

General Provisions.

§ 76A-1. Commission established; powers generally.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Cape Fear Navigation and Pilotage Commission, hereinafter referred to as the Commission. The Commission shall have the power to license and regulate a group of river pilots familiar with the waters of the Cape Fear River and Bar to best guide vessels within those waters. (1981, c. 910, s. 1.)

Editor's Note. — Session Laws 1981, c. 910, s. 3, makes this Subchapter effective July 1, 1981.

§ 76A-2. Membership.

The Commission shall consist of five voting members, four appointed by the Governor, and the president of the Wilmington-Cape Fear Pilots Association who shall serve as an ex officio voting member. Of the four members appointed by the Governor three shall be from New Hanover County, one shall be from Brunswick County. One member shall represent maritime interests. The Governor shall designate a member to serve at his pleasure as Chairman. With the exception of the ex officio member, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981, c. 910, s. 1.)

§ 76A-3. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1981. Two of the initial appointees shall serve two-year terms; the other two appointees shall serve four-year terms. All appointees after the initial appointments shall serve four-year terms. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981, c. 910, s. 1.)

§ 76A-4. Quorum.

A simple majority of the Commission shall constitute a quorum and may act in all cases. (1981, c. 910, s. 1.)

§ 76A-5. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots. In the development of such rules and regulations, the Commission should request the advice of the U.S. Coast Guard, the U.S. Corps of Engineers, the Pilots Association, other maritime interests and any other party that the Commission might deem beneficial.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license as may offer themselves to be a pilot on the Cape Fear River and Bar. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this act and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examination comparable to the standards set in G.S. 76A-5(b).

(d) Fine, License Suspension and Cancellation. — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission chairman; other violations of regulations or in actions

found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

(e) **Pilots to Give Bond.** — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars (\$10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation, so injured may severally bring suit for the damage by each one sustained.

(f) **Jurisdiction over Disputes as to Pilotage.** — Disputes between pilots may be voluntarily appealed by one of the pilots to the Commission for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981, c. 910, s. 1.)

§ 76A-6. Classes of licenses.

The Commission shall have general authority to issue two classes of licenses:

- (1) **Limited.** — A license to pilot vessels whose draft does not exceed 25 feet. Limited licenses may be issued to those who pass requirements established by statute and by the Commission to entitle such person to a limited license.
- (2) **Full.** — A license to pilot any vessel. Full license shall be issued to all holders of a limited license who have in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally the Commission may issue a full license to any one who in the Commission's judgment has sufficient credentials as established under G.S. 76A-5(b) to perform the pilotage task associated with a full license. (1981, c. 910, s. 1.)

§§ 76A-7 to 76A-11: Reserved for future codification purposes.

ARTICLE 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 nor more than 30 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1.)

§ 76A-13. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary.

Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981, c. 910, s. 1.)

§ 76A-14. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-15. At no time shall the number of active licensed pilots exceed 15. Docking masters shall not be deemed pilots for this section or any other section in this Chapter. (1981, c. 910, s. 1.)

§ 76A-15. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer or physician shall have certified to the board the fact of such physical or mental disability. (1981, c. 910, s. 1.)

§ 76A-16. Compulsory use of pilots.

Every foreign vessel and every U.S. vessel sailing under register, including such vessels towing or being towed when underway in the Cape Fear River and Bar and over 60 gross tons, shall employ and take a State-licensed pilot, except when maneuvering during berthing or unberthing operations, shifting within the confine of ports or terminals, passing through bridges, with tug assistance and with a docking master aboard the vessel. Any master of a vessel violating this section shall be guilty of a misdemeanor except as provided for in G.S. 76A-18 and upon conviction the master shall be fined, imprisoned, or both within the discretion of the courts. (1981, c. 910, s. 1.)

§ 76A-17. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotage rates the Commission shall consider but not be limited to factors such as vessels' lengths, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981, c. 910, s. 1.)

§ 76A-18. Vessels not liable for pilotage.

Any vessel coming in from sea for harborage without the assistance of a pilot the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable for pilotage inward from sea. (1981, c. 910, s. 1.)

§§ 76A-19 to 76A-23: Reserved for future codification purposes.

ARTICLE 3.

Commission Funds.

§ 76A-24. Expenses of the Commission.

The pilots association shall pay to the Commission according to rules prescribed by the Commission a percentage of pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars (\$3,000) at the end of the fiscal year shall be returned to the pilot association on a prorated basis determined and distributed by the Commission. (1981, c. 910, s. 1.)

§ 76A-25. Widows and Orphans Fund.

The Widows and Orphans Fund established by Chapter 76, Section 7 of the General Statutes shall be dissolved at the earliest possible date under a method to be determined by the Commission. The method of dissolution should be equitable to all current recipients of benefits from the fund and should attempt to make reasonable provision for their future needs in lieu of on-going payments from the fund. Should the Commission determine that the assets of the fund are in excess of those needed to provide for the recipients, it may determine that a portion of the fund may be retained by the Commission and deposited in its operating fund. In such an event the requirement for payment referred to in G.S. 76A-24 shall be suspended until the balance of the operating fund is reduced to three thousand dollars (\$3,000) as prescribed in G.S. 76A-24. (1981, c. 910, s. 1.)

§§ 76A-26 to 76A-30: Reserved for future codification purposes.

SUBCHAPTER II. MOREHEAD CITY NAVIGATION AND PILOTAGE COMMISSION.

ARTICLE 4.

General Provisions.

§ 76A-31. Morehead City Navigation and Pilotage Commission.

In consideration of the requirement for the safe and expeditious movement of waterborne commerce on the navigable waters of the State, it is deemed necessary to establish the Morehead City Navigation and Pilotage Commission, herein called Commission. The Commission shall have the exclusive power to license and regulate pilots familiar with the waters of Morehead City Harbor and Beaufort Bar, referred to herein as regulated area, to best guide vessels within those waters and to exercise authority over navigation in Morehead City Harbor and Beaufort Bar and to and from the sea buoy of the port. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

§ 76A-32. Membership.

The Commission shall consist of three voting members, all appointed by the Governor. The president of the Morehead City Pilots' Association shall serve as an ex officio nonvoting member. All of the three members appointed by the Governor, shall be from Carteret County. One additional nonvoting ex officio member shall represent the maritime interests and shall be designated by the Governor. The Governor shall designate a voting member to serve at his pleasure as chairman. With the exception of the ex officio members, licensed pilots and members of their immediate families shall not be allowed to serve on the Commission. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-33. Term.

It shall be the duty of the Governor to make initial appointments to the Commission on July 1, 1982. One of the initial appointees shall serve an initial three-year term. One shall serve an initial two-year term and one for an initial one-year term. Thereafter, all appointments shall be for a three-year term. The representatives of the maritime interest shall be appointed for a one-year initial term and three-year terms thereafter. Any vacancy in the membership appointed by the Governor shall be filled by the Governor. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-34. Quorum.

A simple majority of voting members of the Commission shall constitute a quorum and may act in all cases. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-35. Duties and authority.

(a) Rules and Regulations, Pilotage. — The Commission shall make and establish such rules and regulations as necessary and desirable respecting the qualifications, arrangements and station of pilots and for the control of navigation within Morehead Harbor and from and to Beaufort Bar and the sea buoy. In the development of such rules and regulations, the Commission should request the advice of the U. S. Coast Guard, the U. S. Corps of Engineers, the Pilots' Association, other maritime interests and any other party that the Commission might deem beneficial.

(b) Examination and Licensing. — The Commission may examine such persons who hold a federal pilot's license and who have complied with an apprentice course approved by the Commission as may offer themselves to be a pilot on the regulated area. The examination shall consist of, but not be limited to: a personal interview before the Commission; contact by the Commission with personal references; and a physical examination by a licensed physician based on a standard established by the Commission. Licenses shall be granted for a one-year period.

(c) License Renewal. — Each license shall be renewed annually provided during the preceding year the holder thereof shall have complied with the provisions of this Subchapter and the reasonable rules and regulations as prescribed by the Commission under authority hereof. The Commission may for special considerations validate a license for less than a one-year period. Each license renewal submittal shall be accompanied with a physical examination comparable to the standards set in G.S. 76A-35(b).

(d) **Fine, License Suspension and Cancellation.** — The Commission shall have the power to fine or call in and suspend or cancel the license of any pilot found to be derelict of duty, in violation of the reasonable rules and regulations as set out by the Commission or for other just cause. Grounds for suspension or cancellation shall include but not be limited to: citation by the Coast Guard and/or Commission for careless or neglectful duty resulting in damage to property or personal harm; absence, neglect of duty, absence from duty for a period longer than four weeks without written submission to and written approval from the Commission Chairman; other violations of regulations or in actions found by the Commission to be unduly disruptive of the pilotage and service and/or harmful to person or property.

(e) **Pilots to Give Bond.** — The Commission shall require of each pilot prior to granting his commission a bond with surety acceptable to the Commission in an amount not to exceed ten thousand dollars (\$10,000). Every bond taken of a pilot shall be filed with and preserved by the Commission in trust for every person, firm or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm or corporation so injured may severally bring suit for the damage by each one sustained.

(f) **Jurisdiction over Disputes as to Pilotage or Navigation.** — Disputes between pilots or over matters related to navigation in the regulated area may be voluntarily appealed by one of the pilots to the Commission for resolution or so presented to the Commission by any interested party for resolution. If a resolution is not reached or the Commission decision is unacceptable to either party, normal legal recourse is available to resolve the dispute. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-36. Classes of licenses.

The Commission shall have general authority to issue three classes of licenses:

- (1) **Limited.** — A license to pilot vessels whose draft does not exceed 25 feet combined with a maximum length to be fixed by Commission rules. Limited licenses may be issued to those who pass requirements established by statute and by the Commission to entitle such person to a limited license.
- (2) **Full.** — A license to pilot any vessel. Full license shall be issued to all holders of a limited license who have in the opinion of the Commission satisfactorily served at least one year under a limited license. Additionally, the Commission may issue a full license to anyone who in the Commission's judgments has sufficient credentials as established under G.S. 76A-35(b) to perform the pilotage task associated with a full license.
- (3) **Apprentice.** — A license to engage in a program, approved by the Commission, as apprentice pilot under the terms of G.S. 76A-42. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-37 to 76A-41: Reserved for future codification purposes.

ARTICLE 5.

*Pilots.***§ 76A-42. Apprentices.**

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices, none of whom shall be less than 21 nor more than 35 years of age, and to make and enforce reasonable rules and regulations relating thereto. Apprentices shall serve for a minimum of one year but no longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. That upon application of any person already partially qualified by prior experience, the Commission may waive the 35 maximum age limit and may vary the time requirements for the time period of such apprenticeship. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

§ 76A-43. Pilotage association.

In consideration that a mutual association for pilots has been formed, is operational and is expedient for effective management, the Commission shall recognize such a proper pilot association formed for the smooth business transactions in the provision of services. However, the Commission may prescribe such reasonable rules and regulations for the governance of such associations in its direct relationship with the Commission as it deems necessary. Any licensed pilot refusing to become a member of such association shall be subject to suspension or have his license revoked, at the discretion of the Commission. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-44. Number of pilots.

The Commission shall govern the number of pilots necessary to maintain an efficient pilotage service. Present active pilots shall continue to serve with the Commission's power of reduction to be effective only in the case of natural attrition except as provided in G.S. 76A-45. Docking masters shall not be deemed pilots for this section or any other section in this Subchapter. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-45. Pilot retirement.

The Commission shall have and is hereby given authority in its discretion and under such reasonable rules and regulations as it may prescribe to retire from active service any pilot who shall become physically or mentally unfit to perform a pilot's duties. Provided, however, that no pilot shall be retired, except with his consent for physical or mental disability unless and until such pilots shall have first been examined by the public health officer or county physician of his respective county of residence and such public health officer or physician shall have certified to the board the fact of such physical or mental disability. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-46. Compulsory use of pilots.

Every foreign vessel and every United States vessel sailing under register, including such vessels towing or being towed when underway or docking in the regulated area, either incoming or outgoing, and over 60 gross tons, shall employ and utilize a State licensed pilot. Any master of a vessel violating this section by failing to use a State licensed pilot shall be guilty of a misdemeanor except as provided for in G.S. 76A-54 and upon conviction, the master shall be fined, imprisoned, or both within the discretion of the courts. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-47. Pilotage rates.

The Commission shall set charges for pilotage services on a published tariff basis to be reviewed and revised annually as necessary. The initial publication of rates shall be those now in effect and subsequent revisions shall be preceded by public notice at least 30 days prior to publication. The rates may be based on the method chosen by the Commission and may be varied on a geographic or other basis which the Commission deems appropriate. In establishing pilotages' rates, the Commission shall consider, but not be limited to, factors such as vessels' lengths, tonnage, vessels' drafts, general design of vessels, distances for which pilotage services are to be provided, nature of waters to be traversed and the rates for comparable pilotage services in other ports. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§ 76A-48. Vessels not liable for pilotage.

Any vessel, for reasons of safety, coming in from sea for harborage without assistance of a pilot, the wind and weather being such that such pilot assistance or service could not have been reasonably and safely given, shall not be liable for pilotage inward from sea. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

§§ 76A-49 to 76A-53: Reserved for future codification purposes.

ARTICLE 6.***Commission Funds.*****§ 76A-54. Expenses of the Commission.**

The pilots' association shall pay to the Commission, according to rules prescribed by the Commission, a percentage of all pilotage fees not to exceed two percent (2%) per annum for the purpose of providing funds to defray the necessary expense of the Commission. The appropriate percentage shall be set on an annual basis by the Commission. The fees paid shall be deposited to a special account with the State Treasurer in the name of the Commission and shall be administered by the Secretary of Commerce. Surpluses in the account in excess of three thousand dollars (\$3,000) at the end of the fiscal year shall be returned to the pilots' association on a prorated basis determined and distributed by the Commission. That the Commission in carrying out its duties may incur necessary legal and auditing expenses and expenses for its travel and investigations which in addition to the one hundred dollar (\$100.00) per meeting fee and other

allowances allowed by law shall be paid from the foregoing funds. (1981 (Reg. Sess., 1982), c. 1176, s. 1.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1176, s. 3, makes this Article effective July 1, 1982.

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 1.

Commissioners for Opening and Clearing Streams.

Sec.

77-11. Public landings.

ARTICLE 1.

Commissioners for Opening and Clearing Streams.

§ 77-11. Public landings.

The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had 20 days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the courthouse door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing. The board shall at that time initiate proceedings under the Chapter entitled Eminent Domain. (1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; R. C., c. 60, s. 1; c. 101, ss. 2, 4; 1869, c. 20, s. 8, subsec. 29; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9; Code, ss. 2038, 2040, 2982; Rev., ss. 2684, 2685, 5308; 1917, c. 284, s. 33; 1919, c. 68; C. S., ss. 3667, 3762, 3763, 7375; 1981, c. 919, s. 10.)

Cross References. — As to eminent domain, see Chapter 40A.

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, added the present

last sentence of the section and deleted the former second and third paragraphs, specifying the procedure for the taking of land for a public landing.

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

Sec.

78A-2. Definitions.

Article 3.

Exemptions.

78A-16. Exempt securities.

78A-17. Exempt transactions.

Article 4.

Registration of Securities.

78A-26. Registration by coordination.

78A-28. Provisions applicable to registration generally.

Article 5.

Registration of Dealers and Salesmen.

78A-36. Registration requirement.

Sec.

78A-37. Registration procedure.

78A-39. Denial, revocation, suspension, censure, cancellation, and withdrawal of registration.

78A-40. Alternative methods of registration.

78A-41 to 78A-44. [Reserved.]

Article 6.

Administration and Review.

78A-45. Administration of Chapter.

78A-47. Injunctions; cease and desist orders.

78A-48. Judicial review of orders.

Article 7.

Civil Liabilities and Criminal Penalties.

78A-56. Civil liabilities.

ARTICLE 1.

Title and Definitions.

§ 78A-2. Definitions.

When used in this Chapter, unless the context otherwise requires:

- (1) "Administrator" means the Secretary of State.
- (2) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include:
 - a. A salesman,
 - b. A bank, savings institution, or trust company,
 - c. A person who has no place of business in this State if
 1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or
 2. In the case of a person registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934 and in one or more states, during any period of 12 consecutive months he does not effect more than 15 purchases or sales in this State in any manner with persons other than those specified in clause 1, whether or not the dealer or any of the purchasers or sellers is then present in this State, or
 - d. An issuer if

1. The security is exempted under subdivisions (1), (2), (3), (4), (7), (9), (10), (11), (13), or (14) of G.S. 78A-16, or the transaction is exempted under G.S. 78A-17, and such exemption has not been denied or revoked under G.S. 78A-18, or
2. The security is registered under this Chapter and it is offered and sold through a registered dealer, or
3. All of the following conditions are met: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State, and (ii) the total amount of the offering, and the total number of purchasers, both within and without this State, does not exceed five hundred thousand dollars (\$500,000) and 100, respectively.

(9) "Salesman" means any individual other than a dealer who represents a dealer in effecting or attempting to effect purchases or sales of securities. A partner, executive officer, or director of a dealer, or a person occupying a similar status or performing similar functions, is a salesman only if he otherwise comes within this definition.

(1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3; 1955, c. 436, s. 1; 1973, c. 1380; 1983, c. 817, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, substituted "Secretary of State" for "official designated in G.S. 78A-45(a)" in subdivision (1), substituted "subdivisions (1), (2), (3), (4), (7), (9), (10), (11), (13), or (14)" for "subdivisions (1), (2), (3), (10),

(11), (13), or (14)" in subdivision (2)d.1, deleted "or issuer" preceding "in effecting" in the first sentence of subdivision (9), deleted the former second sentence of subdivision (9), which provided that certain individuals are not included in the term "salesman," and deleted "or issuer" following "a dealer" and inserted "executive" in the present second sentence of subdivision (9).

ARTICLE 3.

Exemptions.

§ 78A-16. Exempt securities.

The following securities are exempted from G.S. 78A-24 and 78A-49(d):

- (7) Any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company of one of the foregoing which is (i) subject to the jurisdiction of the Interstate Commerce Commission; (ii) a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; (iii) regulated in respect of its rates and charges by a governmental authority of the United States or any state; or (iv) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province;
- (9) Any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association provided, however, that the Administrator may by rule or order impose conditions upon this exemption either generally or in relation to specific securities or transactions;
- (11) Any interest in an employees' stock purchase, stock option, savings, pension, profit-sharing or other similar benefit plan;

(1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5; 1955, c. 436, s. 2; 1967, c. 1233, s. 1; 1973, c. 1380; 1981, c. 624, s. 1; 1983, c. 817, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment rewrote subdivision (11).

The 1983 amendment, effective July 19, 1983, inserted "of one of the foregoing" in subdivi-

vision (7). In addition, the 1983 amendment, effective Oct. 1, 1983, deleted "under the laws of this State or having its principal office in this State" following "by any person organized" and added the language beginning "provided, however, that" in subdivision (9).

§ 78A-17. Exempt transactions.

The following transactions are exempted from G.S. 78A-24 and 78A-49(d):

- (8) Any offer or sale to a corporation which has a net worth in excess of one million dollars (\$1,000,000) as determined by generally accepted accounting principles, bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;
- (9) Any transaction pursuant to an offer directed by the offeror to not more than 25 persons, other than those persons designated in subdivision (8), in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment. The Administrator may by rule or order withdraw, amend, or further condition this exemption for any security or security transaction and establish a fee to recover costs for any filing required, not to exceed one hundred fifty dollars (\$150.00).
- (10) Any offer or sale of a preorganizational certificate or subscription if:
 - (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber;
 - (ii) no public advertising or solicitation is used in connection with the offer or sale;
 - (iii) the number of subscribers does not exceed 10 and the number of offerees does not exceed 25; and
 - (iv) no payment is made by any subscriber.
- (17) Any transaction that is exempt pursuant to rules established by the Administrator creating limited offering transactional exemptions that are consistent with the objectives of compatibility with federal limited offering exemptions and uniformity among the states. The Administrator may establish a fee to recover costs for any filing required by such rules, not to exceed one hundred fifty dollars (\$150.00). (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154; 1955, c. 436, s. 3; 1959, c. 1185; 1967, c. 1233, ss. 2, 3; 1971, c. 572, s. 1; 1973, c. 1380; 1977, c. 162; c. 610, s. 1; 1979, c. 647, s. 1; 1981, c. 624, s. 2; 1981 (Reg. Sess., 1982), c. 1263, ss. 1, 2; 1983, c. 509, ss. 1, 2; c. 817, ss. 6, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1981 amendment added the language beginning "however, the Administrator" at the end of former subdivision (9)b.

The 1981 (Reg. Sess., 1982) amendment added "or establish a fee for any filing required up to a maximum of one hundred fifty dollars (\$150.00) to recover costs" at the end of former subdivisions (9)a and (9)b.

The first 1983 amendment rewrote subdivision (9) and added subdivision (17). Section 3 of S.L. 1983, c. 509, makes the amendment to

subdivision (9) effective Oct. 1, 1983, while the provision adding new subdivision (17) is made effective July 1, 1983.

The second 1983 amendment, effective July 19, 1983, inserted "which has a net worth in

excess of one million dollars (\$1,000,000) as determined by generally accepted accounting principles" in subdivision (8) and rewrote subdivision (10).

ARTICLE 4.

Registration of Securities.

§ 78A-26. Registration by coordination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

- (1) One copy of the latest form of prospectus filed under the Securities Act of 1933;
 - (2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;
 - (3) If the Administrator requests, any other information or copies of any other documents filed under the Securities Act of 1933; and
 - (4) An undertaking to forward all future amendments to the federal prospectus, other than an amendment which merely delays the effective date of the registration statement, promptly and in any event not later than the first business day after they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.
- (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380; 1981, c. 624, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "One copy" for "Three copies" at the beginning of subdivision (b)(1).

§ 78A-28. Provisions applicable to registration generally.

(b) Every person filing a registration statement shall pay a filing fee of one hundred dollars (\$100.00), plus a registration fee of one-tenth of one percent ($\frac{1}{10}$ of 1%) of the maximum aggregate offering price at which the registered securities are to be offered in this State, but the registration fee may not be less than twenty-five dollars (\$25.00) nor more than one thousand five hundred dollars (\$1,500). When a registration statement is withdrawn before the effective date or a pre-effective stop order is entered under G.S. 78A-29, the Administrator shall retain the filing fee. A registration statement relating to securities issued or to be issued by a mutual fund, open-end management company, or unit investment trust or relating to other redeemable securities, to be offered for a period in excess of one year, must be renewed annually by payment of a renewal fee of one hundred dollars (\$100.00) and by filing any documents or reports that the Administrator may by rule or order require.

(h) Except during the time a stop order is in effect under G.S. 78A-29, a registration statement relating to securities issued or to be issued by a mutual fund, open-end management company, or unit investment trust or relating to other redeemable securities, to be offered for a period in excess of one year,

expires on December 31 of each year or some other date not more than one year from its effective date as the Administrator may by rule or order provide. Every other registration statement is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by any underwriter or dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, except during the time a stop order is in effect under G.S. 78A-29. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction (i) so long as the registration statement is effective and (ii) between the thirtieth day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under G.S. 78A-29 (if the registration statement did not relate in whole or in part to a nonissuer distribution) and one year from the effective date of the registration statement. A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the Administrator.

(j) A registration statement filed in accordance with subsection (b) of this section may be amended after its effective date to increase the securities specified as proposed to be offered. Such an amendment becomes effective when the Administrator so orders. Every person filing such an amendment shall pay a registration fee calculated in the manner specified in subsection (b) and a filing fee of fifty dollars (\$50.00) with respect to the additional securities proposed to be offered. (1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 1; 1981, c. 452; c. 624, s. 3; c. 682, s. 14; 1983, c. 713, ss. 45-47.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment added the parenthetical language concerning a unit investment trust in the third sentence of subsection (b) as it read prior to the 1983 amendment.

The second 1981 amendment, in the first sentence of subsection (j), substituted "subsection (b)" for "subsection (j)," and deleted "so as" following "its effective date."

The third 1981 amendment, effective July 1,

1981, substituted "subsection (b)" for "subsection (j)" in the first sentence of subsection (j).

The 1983 amendment, effective Aug. 1, 1983, rewrote subsection (b), in subsection (h) inserted the present first sentence and inserted "other" following "Every" at the beginning of the present second sentence, and in subsection (j) substituted "a filing fee of fifty dollars (\$50.00)" for "such filing fee not to exceed twenty-five dollars (\$25.00) as the Administrator may by rule or order require" in the last sentence.

ARTICLE 5.

Registration of Dealers and Salesmen.

§ 78A-36. Registration requirement.

(b) It is unlawful for any dealer to employ a salesman unless the salesman is registered. The registration of a salesman is not effective during any period when he is not associated with a particular dealer registered under this Chapter. When a salesman begins or terminates those activities which make him a salesman, the salesman as well as the dealer shall promptly notify the Administrator.

The Administrator may by rule or order require the return of a salesman's license upon the termination of those activities which make him a salesman or, if such return is impossible, require a bond or evidence satisfactory to the Administrator of such impossibility. No salesman may be registered with more than one dealer.

(1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1975, c. 144, s. 2; 1979, 2nd Sess., c. 1148, s. 2; 1981, c. 624, s. 4; 1983, c. 817, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added the last sentence in subsection (b).

The 1983 amendment, effective July 19, 1983, deleted "or issuer" following "any dealer" in the first sentence of the first para-

graph of subsection (b), deleted "or a particular issuer" from the end of the second sentence of the first paragraph of subsection (b), deleted "or issuer" following "the dealer" in the third sentence of the first paragraph of subsection (b), and deleted "or issuer" from the end of the second sentence of the second paragraph of subsection (b).

§ 78A-37. Registration procedure.

(a) A dealer or salesman may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to G.S. 78A-63(f). The application shall contain whatever information the Administrator by rule requires concerning such matters as (i) the applicant's form and place of organization; (ii) the applicant's proposed method of doing business; (iii) the qualifications and business history of the applicant; in the case of a dealer, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer, and a representation that the applicant dealer is duly registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (v) the applicant's financial condition and history. If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day after an application is filed. The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a dealer automatically constitutes registration of any salesman who is a partner, executive officer, or director, or a person occupying a similar status or performing similar functions.

(b) Every applicant for initial or renewal registration shall pay a filing fee of one hundred fifty dollars (\$150.00) in the case of a dealer and twenty-five dollars (\$25.00) in the case of a salesman. The Administrator may by rule reduce the registration fee proportionately when the registration will be in effect for less than a full year.

(d) The Administrator may by rule require registered dealers to post surety bonds in amounts up to one hundred thousand dollars (\$100,000) and salesmen to post surety bonds in amounts up to ten thousand dollars (\$10,000), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, which may be defined by rule, exceeds one hundred thousand dollars (\$100,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78A-56 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two years after the sale or other act upon which it is based. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 713, s. 48; c. 817, ss. 9, 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The first 1983 amendment, effective Aug. 1, 1983, substituted "one hundred fifty dollars (\$150.00)" for "fifty dollars (\$50.00)" and "twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in the first sentence of subsection (b).

The second 1983 amendment, effective July 19, 1983, inserted "executive" in the last sentence of subsection (a), inserted "to post surety bonds in amounts up to one hundred thousand dollars (\$100,000)" in the first sentence of subsection (d) and substituted "one hundred thousand dollars (\$100,000)" for "twenty-five thousand dollars (\$25,000)" in the third sentence of subsection (d).

§ 78A-39. Denial, revocation, suspension, censure, cancellation, and withdrawal of registration.

(a) The Administrator may by order deny, suspend, or revoke any registration in whole or in part or restrict or limit as to any person, office, function, or activity or censure the registrant if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant or, in the case of a dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer:

- a. Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact; or
- b. Has willfully violated or willfully failed to comply with any provision of this Chapter or a predecessor law or any rule or order under this Chapter or a predecessor law or any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisors Act of 1940, or the Commodity Exchange Act; or
- c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or any aspect of the securities business, or any felony; or
- d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business; or
- e. Is the subject of an order of the Administrator denying, suspending, or revoking registration as a dealer or salesman; or
- f. Is the subject of an order entered within the past five years by the securities administrator of any state or by the Securities and Exchange Commission denying or revoking registration as a dealer or salesman, or the substantial equivalent of those terms as defined in this Chapter, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; but (i) the Administrator may not institute a revocation or suspension proceeding under subdivision (2)f of subsection (a) more than one year from the date of the order relied on, and (ii) he may not enter an order under subdivision (2)f of subsection (a) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section; or

- g. Has engaged in dishonest or unethical practices in the securities business; or
- h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against a dealer under this paragraph without a finding of insolvency as to the dealer; or
- i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b).

The Administrator may by order deny, suspend, or revoke any registration in whole or in part or restrict or limit as to any person, office, function, or activity or censure the registrant if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant:

- a. Has failed reasonably to supervise his salesmen if he is a dealer; or
- b. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 120 days.

(e) Withdrawal from registration as a dealer or salesman becomes effective 90 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 90 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S. 78A-39(a)(2)b within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 817, ss. 11-15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, inserted "in whole or in part or restrict or limit as to any person, office, function, or activity, or censure the registrant" in the introductory language of the first and second paragraphs of subsection

(a), inserted the language beginning "or any provision of" at the end of clause (2)b of the first paragraph of subsection (a), substituted "120 days" for "30 days" in the last paragraph of subsection (a), and substituted "90 days" for "30 days" in two places in the first sentence of subsection (e). The act also amended the section catchline.

§ 78A-40. Alternative methods of registration.

(a) The Administrator may by rule or order provide an alternative method of registration by which any dealer or salesman acting in that capacity or as a principal may satisfy the requirements of this Article by furnishing the information otherwise required to be filed pursuant to this Article. The Administrator may provide for, among other things, alternative filing periods for dealers or salesmen, elimination of the issuance of a paper license and alternative methods for the payment and collection of initial or renewal filing fees,

which shall be known as "alternative filing fees". The alternative filing fees shall be the same as provided in G.S. 78A-37 (b).

(b) The Administrator may not adopt an alternative method of registration unless its purpose is to facilitate a central registration depository whereby dealers or salesmen can centrally or simultaneously register and pay fees for all states in which they plan to transact business that require registration. The Administrator may enter into an agreement with or otherwise facilitate an alternative method of registration with any national securities association registered with The Securities and Exchange Commission pursuant to Section 15A of the Securities Exchange Act of 1934, any national securities exchange registered under the Securities Exchange Act of 1934, or any national association of state securities Administrators or similar association to effectuate the provisions of this section.

(c) Nothing in this section shall be construed to prevent the denial, revocation, suspension, censure, cancellation or withdrawal by the Administrator of a registration of a dealer or salesman as provided in G.S. 78A-39. (1981, c. 624, s. 5; 1983, c. 817, s. 16.)

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, inserted "censure" in subsection (c).

§§ 78A-41 to 78A-44: Reserved for future codification purposes.

ARTICLE 6.

Administration and Review.

§ 78A-45. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State. The Secretary of State as Administrator may delegate all or part of the authority under this Chapter to the Deputy Securities Administrator including, but not limited to, the authority to conduct hearings, make, execute and issue final agency orders and decisions. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed.

(1925, c. 190, ss. 20, 21; 1927, c. 149, ss. 20, 21; 1973, c. 1380; 1983, c. 817, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, deleted "and such

deputies and assistants as he shall designate" from the end of the first sentence of subsection (a) and added the present second sentence of subsection (a).

§ 78A-47. Injunctions; cease and desist orders.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the Administrator to post a bond.

- (b) (1) If the Administrator determines after giving notice of and opportunity for a hearing, that any person has engaged in or is about to engage in, any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may order such person to cease and desist from such unlawful act or practice and take such affirmative action as in the judgment of the Administrator will carry out the purposes of this Chapter.
- (2) If the Administrator makes written findings of fact that the public interest will be irreparably harmed by delay in issuing an order under G.S. 78A-47(b)(1), the Administrator may issue a temporary cease and desist order. Upon the entry of a temporary cease and desist order, the Administrator shall promptly notify in writing the person subject to the order that such order has been entered, the reasons therefor, and that within 20 days after the receipt of a written request from such person the matter shall be set down for hearing to determine whether or not the order shall become permanent and final. If no hearing is requested and none is ordered by the Administrator, the order shall remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after giving notice of an opportunity for a hearing to the person subject to the order, shall by written findings of fact and conclusion of law, vacate, modify, or make permanent the order.
- (3) No order under subsection (b), except an order issued pursuant to G.S. 78A-47(b)(2), may be entered without prior notice of an opportunity for hearing. The Administrator may vacate or modify an order under this subsection (b) upon his finding that the conditions which required such an order have changed and that it is in the public interest to so vacate or modify.
- (4) A final order issued pursuant to the provisions of subsection (b) shall be subject to review as provided in G.S. 78A-48. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1983, c. 817, s. 18.)

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, designated the existing provisions as subsection (a) and added

subsection (b). The act also amended the section catchline.

§ 78A-48. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence together with any modified or new findings or order.

The judgment of the court is final, subject to review by the Court of Appeals. (1925, c. 190, s. 18; 1927, c. 149, s. 18; 1973, c. 1380; 1977, c. 610, s. 3; 1983, c. 817, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, substituted "Wake County" for "any county" and substi-

tuted "within 30 days after a written copy of the decision is served upon the person by personal service or by registered mail" for "within 60 days after the entry of the order" in the first sentence of subsection (a).

ARTICLE 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

(a) Any person who:

- (1) Offers or sells a security in violation of G.S. 78A-10(b), 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or
 - (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and did not act in reckless disregard, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at the legal rate from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate as provided by G.S. 24-1 from the date of disposition.
- (g) (1) No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at [at] the legal rate as provided by G.S. 24-1 from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.
- (2) No seller may sue under this section if, before suit is commenced, the seller has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the seller of his rights; offering to return the security plus the amount of any income received thereon upon payment of the consideration received, or, if the purchaser no longer owns the security, offering to pay the seller upon

acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (b); and providing that the offer may be accepted by the seller at any time within 30 days of its receipt; and the seller has failed to accept such offer in writing within the specified period.

- (3) Offers shall be in the form and contain the information the Administrator by rule prescribes. Every offer under subsection (g) shall be delivered to the offeree or sent by certified mail addressed to him at his last known address. If an offer is not performed in accordance with its terms, suit by the offeree under this section shall be permitted without regard to this subsection.

(1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 1380; 1975, c. 19, s. 22; c. 144, s. 3; 1977, c. 781, s. 2; 1983, c. 817, ss. 20, 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — The word "at" inadvertently appears twice preceding "the legal rate" in subdivision (g)(1), pursuant to the 1983 amendment. Brackets have been inserted to indicate this duplication.

Effect of Amendments. — The 1983 amendment, effective July 19, 1983, substituted "the legal rate" for "six percent (6%) per year" in the first sentence of subsection (a), inserted "as provided by G.S. 24-1" in the second sentence of subsection (a), and substituted "at the legal rate as provided by G.S. 24-1" for "six percent (6%) per year" in subdivision (1) of subsection (g).

Chapter 78B.

Tender Offer Disclosure Act.

§ 78B-1. Title.

Legal Periodicals. —

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

CASE NOTES

Legislative Purpose. — This Chapter was passed in an attempt to supplement the federal regulation of tender offers and to remedy the perceived inadequacies in that legislation. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of share-

holders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-2. Definitions.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program

preceding or accompanying the rapid accumulation of the corporation's stock. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

"Tender Offer" Requires Communication to Shareholders. — There is no "tender offer" under this Chapter until an offer or invitation to purchase is communicated to shareholders. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

And, open market transactions involve no such offer or invitation and no such communication to shareholders as is contemplated by this Chapter. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-3. Mandatory provisions of and limitations on tender offers.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal

marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-4. Disclosure.

CASE NOTES

Applicability of Chapter. — This Chapter does not apply to open market acquisitions of securities aimed at gaining corporate control where the seller experiences no more than the normal market pressures to sell. Therefore, it did not apply to open market purchases of a corporation's stock where (1) there was no active and widespread solicitation of shareholders; (2) there was no premium offered over market price; (3) the purchaser's "offer" of terms was subject to the working of the normal

marketplace; (4) there was no offer contingent on tender of a fixed number of shares; (5) there was no offer open for a limited period of time; (6) the shareholders were not subjected to pressure to sell their stock; and (7) there were no public announcements of a purchasing program preceding or accompanying the rapid accumulation of the corporation's stock. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-6. Civil liabilities.

CASE NOTES

Stated in *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-7. Injunctions.

CASE NOTES

Cited in *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-8. Criminal penalties.**CASE NOTES**

Cited in *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

§ 78B-11. Severability.**CASE NOTES**

Applied in *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E.2d 422 (1981).

Chapter 80.

Trademarks, Brands, etc.

Article 1.

Trademark Registration Act.

Sec.

80-3. Application for registration.

ARTICLE 1.

Trademark Registration Act.

§ 80-1. Definitions.

Legal Periodicals. —

For an article on antitrust and unfair trade

practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

§ 80-3. Application for registration.

Subject to the limitations set forth in this Article, any person who uses a mark, or any person who controls the nature and quality of the goods or services in connection with which a mark is used by another, in this State may file in the office of the Secretary of State on a form to be furnished by the Secretary of State, an application for registration of that mark setting forth, but not limited to, the following information:

- (1) The name and business address of the person applying for such registration; and, if a corporation, the state of incorporation;
- (2) The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with such goods or services and the class in which such goods or services fall;
- (3) The date when the mark was first used anywhere and the date when it was first used in this State by the applicant, his predecessor in business or by another under such control of applicant; and
- (4) A statement that the applicant is the owner of the mark and that no other person except as identified by applicant has the right to use such mark in this State either in the identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor.

The application shall be signed and verified by the applicant or by a member of the firm or an officer of the corporation or association applying.

The application shall be accompanied by a specimen or facsimile of such mark in triplicate.

The application for registration shall be accompanied by a filing fee of twenty-five dollars (\$25.00), payable to the Secretary of State. (1903, c. 271, s. 3; Rev., s. 3014; C.S., s. 3973; 1935, c. 60; 1941, c. 255, s. 2; 1967, c. 1007, s. 1; 1983, c. 713, s. 49.)

Effect of Amendments. — The 1983 amendment, effective Aug. 1, 1983, substituted

"twenty-five dollars (\$25.00)" for "ten dollars (\$10.00)" in the last sentence.

Chapter 81A.

Weights and Measures Act of 1975.

Article 1.

Administration of Chapter.

Sec.

81A-10. Reimbursement of expenses.

81A-11 to 81A-14. [Reserved.]

Article 3.

Violations.

81A-29. Offenses and penalties.

Article 4.

Uniform Weights and Measures.

81A-37 to 81A-40. [Repealed.]

81A-43. [Repealed.]

Article 5.

Public Weighmasters.

81A-50. [Repealed.]

81A-50.1. Purpose.

81A-51. Definitions.

81A-52. License.

Sec.

81A-53. Certificates of weight.

81A-54. Official seal of the public weighmaster.

81A-55. Violations by public weighmasters; by others; penalties.

81A-56, 81A-57. [Repealed.]

81A-58. Duty of custodian of product.

81A-59. Weighing tobacco.

81A-60. [Repealed.]

81A-61. Approval of devices used.

81A-62 to 81A-64. [Repealed.]

Article 6.

Scale Technician.

81A-70. Purpose of Article.

81A-71. Prerequisites for scale technician.

81A-72. Registration; certificate of registration; annual renewal.

81A-73. Service certificate.

81A-74. [Repealed.]

81A-80. Suspension or revocation of registration; penalty.

ARTICLE 1.

Administration of Chapter.

§ 81A-10. Reimbursement of expenses.

When any manufacturer requests prototype approval of any commercial weighing or measuring device, said manufacturer shall reimburse the Department of Agriculture for expenses incurred in the prototype examination of the device before final prototype approval is granted. Travel expenses shall be at the rates established by G.S. 138-6 or any law enacted in substitution therefor. (1981, c. 495, s. 1.)

§§ 81A-11 to 81A-14: Reserved for future codification purposes.

ARTICLE 3.

Violations.

§ 81A-29. Offenses and penalties.

Any person who violates any provision of this section or any provision of this Chapter or regulations promulgated pursuant thereto for which a specific penalty has not been prescribed shall be guilty of a misdemeanor, and upon a first conviction thereof shall be punished by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00), or by imprisonment for not more than three months, or both. Upon a subsequent conviction thereof, said person shall be punished by a fine of not less than one hundred dollars (\$100.00) or more than one thousand dollars (\$1,000) or by imprisonment for up to one year, or both. No person shall:

- (6) Manufacture, use or possess a counterfeit seal, tag, mark, certificate, label or decal representing, imitating or copying the same issued by the Commissioner under this Chapter. (1927, c. 261, ss. 14, 15, 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544; 1981, c. 607, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added subdivision (6).

ARTICLE 4.

Uniform Weights and Measures.

§§ 81A-37 to 81A-40: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-43: Repealed by Session Laws 1981, c. 607, s. 2.

ARTICLE 5.

Public Weighmasters.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

Repeal of Article. —

§ 81A-50: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-50.1. Purpose.

This Article licenses and regulates public weighmasters in order to ensure accurate quantities of products upon sale to purchasers. (1981, c. 607, s. 3.)

§ 81A-51. Definitions.

For purposes of this Article, the following words, terms and phrases are defined as follows:

- (1) "Board" means North Carolina Board of Agriculture.
- (2) "Commissioner" means the North Carolina Commissioner of Agriculture or his designated agent.
- (3) "Department" means the North Carolina Department of Agriculture.
- (4) "Product" means any product, commodity or article.
- (5) "Public weighmaster" means any person who shall weigh, measure or count, or who shall ascertain from a weighing, measuring or recording device for any other person and declare the weight to be the accurate weight of the product upon which the purchase, sale or exchange is based, and receive compensation for the act.
- (6) "Weigh" means weigh, measure, count, read or record.
- (7) "Weight" means weight, measure, count, reading or recording. (1939, c. 285, s. 1; 1945, c. 1067; 1971, c. 1085, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments.—The 1981 amendment rewrote this section.

§ 81A-52. License.

All public weighmasters shall be licensed. Any person not less than 18 years of age who wishes to be a public weighmaster shall apply to the Department on a form provided by the Department. The Board may adopt rules for determining the qualifications of the applicant for a license. Public weighmasters shall be licensed for a period of one year beginning the first day of July and ending on the thirtieth day of June, and a fee of ten dollars (\$10.00) shall be paid for each person licensed at the time of the filing of the application. (1939, c. 285, s. 2; 1949, c. 983, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments.—The 1981 amendment rewrote this section.

§ 81A-53. Certificates of weight.

All public weighmasters shall issue certificates of weight, measure, count, reading or recording on forms approved by the Commissioner and shall enforce the provisions of this Chapter and all rules and regulations promulgated thereunder without compensation from the State. Each certificate issued shall indicate the date on which a product is weighed, counted, read or recorded. A certificate issued by a public weighmaster shall be considered the accurate weight of a product at the time the product is put into the natural channels of trade, with the qualification that reasonable variations or tolerances shall be permitted as established by rules and regulations enacted pursuant to this Chapter. If any person questions the accuracy of the weight of any product for which a certificate has been issued, a complaint shall be made to the public weighmaster who issued the certificate or to the Commissioner before the product is moved from the city, town or community where the certificate was issued. The product shall be reweighed by the public weighmaster issuing the certificate or by the Commissioner, if the product is kept in accordance with G.S. 81A-58. If, upon reweighing, a difference in excess of the tolerance allowed by the Chapter is found in the original weight, the cost of reweighing shall be borne by the public weighmaster responsible for issuing the faulty certificate. Otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 3; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments.—The 1981 amendment rewrote this section.

§ 81A-54. Official seal of the public weighmaster.

It shall be the duty of every public weighmaster to obtain from the Department an official seal for the sum of five dollars (\$5.00), inscribed with the following words: "North Carolina Public Weighmaster" and any other design or legend the Commissioner considers necessary. The seal shall be stamped or impressed on every certificate issued pursuant to this Article. The weighers of tobacco in leaf tobacco warehouses may use, instead of the seal, their signatures in ink or other indelible substance posted in a conspicuous and accessible place in the warehouse. All seals remain the property of the State and shall be returned to the Commissioner upon termination of duties as a public weighmaster. (1939, c. 285, s. 4; 1941, c. 317, s. 1; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment, in the first sentence, deleted “so licensed under this Article” preceding “to obtain,” substituted “Department” for “North Carolina Department of Agriculture,” deleted “which seal shall have” preceding “inscribed,” substituted “with” for “thereon” following “inscribed,” substituted “any” for “such” preceding “other design,” substituted “or” for “and/or” preceding “legend,” deleted “as” following “legend,” and substituted “considers

necessary” for “or his authorized agent may deem appropriate” at the end of the first sentence. The amendment also rewrote the former second sentence as the present second and third sentences, and in the fourth sentence, deleted “public weighmasters” preceding “seals,” deleted “shall” preceding “remain,” and substituted the language beginning “and shall be returned” for “of North Carolina” at the end of the fourth sentence.

§ 81A-55. Violations by public weighmasters; by others; penalties.

(a) Any public weighmaster who refuses to issue a certificate as prescribed by this Article, or who issues a certificate giving a false weight, or who misrepresents the weight to any person, or who otherwise violates any provisions of this Article or the rules and regulations pursuant to this Article, may have his license revoked, suspended or terminated by the Commissioner.

(b) The following acts by other persons are also violations of this Article:

- (1) Requesting a public weighmaster to weigh a product inaccurately;
- (2) Requesting an inaccurate certificate prescribed by this Article;
- (3) Impersonating a public weighmaster;
- (4) Erasing, changing or altering any certificate issued by a public weighmaster;
- (5) Increasing or decreasing the weight of a product for the purpose of deception; or
- (6) Violating any other provision of this Article. (1939, c. 285, s. 5; 1975, c. 544; 1981, c. 607, s. 4.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§§ 81A-56, 81A-57: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-58. Duty of custodian of product.

If any product is to be offered for sale, or is sold, and is weighed or measured or counted by any public weighmaster and a certificate is issued prior to sale or acceptance of the product by the purchaser, or if any product is offered for sale, sold or delivered pending the weighing, measuring or counting of the product by any public weighmaster and the issuance of a certificate, the person who is in custody of the product shall keep, protect and prevent any increase or decrease in weight in the time intervening between the weighing and the issuance of the certificate and the sale, and the time intervening between the sale and the presentation of the product to the weighmaster for weighing, measuring or counting and the issuance of a certificate. Any loss sustained in the weight of the product while in custody shall be borne by the custodian. (1939, c. 285, s. 8; 1975, c. 544; 1981, c. 607, s. 5.)

Effect of Amendments. — The 1981 amendment rewrote the former first and second sentences as the present first sentence, and in the present second sentence, substituted “of the product” for “or measure or count of any com-

modity, product, or article,” and substituted “custodian” for “person, firm or corporation in whose custody said commodity, product, or article is” at the end of the second sentence.

§ 81A-59. Weighing tobacco.

All leaf tobacco offered for sale in a leaf tobacco warehouse in North Carolina shall remain in the custody of the warehouse operator from and after the time it is weighed by the public weighmaster until it is sold or the bid is rejected by the owner. (1945, c. 1067; 1975, c. 544; 1981, c. 607, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "North Carolina" for "this State," deleted "be weighed by a public weighmaster, shall be accompanied by a public

weighmaster certificate, and shall be and" preceding "remain in," inserted "the" preceding "custody," and deleted "thereof" at the end of the section.

§ 81A-60: Repealed by Session Laws 1981, c. 607, s. 2.

§ 81A-61. Approval of devices used.

When making a weight determination, a public weighmaster shall use a weighing device that is of a type suitable for the weighing of the product to be weighed and that has been tested and approved for use by the Commissioner within a period of 12 months immediately preceding the date of the weighing. (1939, c. 285, s. 10; 1975, c. 544; 1981, c. 607, s. 6.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§§ 81A-62 to 81A-64: Repealed by Session Laws 1981, c. 607, s. 2.

ARTICLE 6.***Scale Technician.*****§ 81A-70. Purpose of Article.**

The purpose of this Article shall be to protect the owners and users of scales and weighing devices in their needs for scale repair and service, and to provide for scale technician registration. (1941, c. 237, s. 1; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 1.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, inserted "and" preceding "two provide for," and deleted "and to

provide for financial underwriting of services rendered" at the end of the section.

§ 81A-71. Prerequisites for scale technician.

It shall be unlawful for any scale technician to render service as a scale technician until after he or she has complied with the following requirements:

- (1) Obtained from the Department of Agriculture a copy of this Article, a copy of regulations pertinent to said Article, and an application form for registration.
- (2) to (4) Repealed by Session Laws 1983, c. 111, s. 2, effective July 1, 1983.
- (5) Obtained a registration card or certificate from the Commissioner or his authorized agent and a model form of service certificate.
- (6) Obtained from the Department an annual certification of the standards of weight which will be used by the scale technician.

The provisions of this Article shall not apply to a full-time employee who renders service only on a scale or weighing device, or on scales or weighing devices, owned solely by his or her employer unless additional pay or compensation is received for such service. (1941, c. 237, s. 3; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 2.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, deleted subdivisions (2), (3), and (4), relating to the giving of

a bond by a scale technician, and added subdivision (6).

§ 81A-72. Registration; certificate of registration; annual renewal.

The Commissioner or his authorized agent shall register any person who has complied with the requirements of this Article by making a record of receipt of application, and the issuing of a certificate or card of registration to applicant, whereupon the applicant becomes a registered scale technician and shall be known thereafter as such. Such registration shall be in effect from date of registration until July 1 next and shall be renewed on the first day of July of each year thereafter. (1941, c. 237, ss. 4, 5; 1943, c. 543; 1947, c. 380; 1975, c. 544; 1983, c. 111, s. 3.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, deleted "and of

bond" following "record of receipt of application" in the first sentence.

§ 81A-73. Service certificate.

Whenever any service is rendered on any scale or weighing device used or intended to be used in this State by a scale technician, a certificate shall be issued by such scale technician who rendered said service, which shall be known as a "service certificate." The size and form of said service certificate shall be determined by the Commissioner or his authorized agent. Inclusive of other pertinent information or statements, the said certificate shall bear a statement expressed in ink or other indelible substance naming the kind of service rendered, whether adjustment, installation, repair, or maintenance, and stating that a service test as defined under the term "service" has been made, and that the service rendered is guaranteed to be as represented. The service certificate shall be made out in triplicate, with original going to the owner of such scale of weighing device or his agent, and a duplicate shall be sent to the Commissioner or his authorized agent and the triplicate copy shall be retained by the scale technician issuing such certificate. (1947, c. 380; 1975, c. 544; 1983, c. 111, s. 4.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, deleted "if service is upon a scale or weighing device which has

been rejected or condemned by an authorized agent" following "Commissioner or his authorized agent" in the last sentence.

§ 81A-74: Repealed by Session Laws 1983, c. 111, s. 5, effective July 1, 1983.

§ 81A-80. Suspension or revocation of registration; penalty.

(a) The Commissioner may suspend or revoke the registration of any scale technician who violates any provisions of this Article or regulations adopted thereunder or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered.

(b) Any person who violates any provision of this Article shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or imprisoned for not more than three months or be fined and imprisoned. (1941, c. 237, s. 7; 1947, c. 380; 1949, c. 983, s. 2; 1975, c. 544; 1983, c. 111, s. 6.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, rewrote this section.

Chapter 83A.

Architects.

Sec.

83A-7. Qualifications and examination requirements.

§ 83A-1. Definitions.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 83A-7. Qualifications and examination requirements.

(a) **Licensing by Examination.** — Any individual who is at least 18 years of age and of good moral character may make written application for examination by completion of a form prescribed by the Board accompanied by the required application fee. Subject to qualification requirements of this section, the applicant shall be entitled to an examination to determine his qualifications for licensure.

(1) The qualification requirements for registration as a duly licensed architect shall be:

- a. A degree in architecture from a college or university where the degree program has been approved by the Board, or professional education equivalents as specified by rules of the Board, and at least three years practical training and experience as specified by rules of the Board.
- b. The successful completion of a licensure examination in architecture as specified by the rules of the Board.

(2) The Board shall adopt rules to set requirements for professional education and equivalents, practical training and experience, and examination which must be met by applicants for licensure and which may be based on the published guidelines of nationally recognized councils or agencies for the accreditation, examination, and licensing for the architectural profession.

(1915, c. 270, s. 3; 1919, c. 336, s. 1; C.S., s. 4992; 1957, c. 794, s. 7; 1971, c. 1231, s. 1; 1979, c. 871, s. 1; 1983, c. 47.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective March 4, 1983, deleted the

former third sentence of the introductory paragraph of subsection (a), relating to the successful completion of a professional examination, and rewrote paragraphs (a)(1)a. and (a)(1)b. and subdivision (a)(2).

§ 83A-17. Power of Board to seek injunction.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

Sec.

84-2. Persons disqualified.

84-4. Persons other than members of State Bar prohibited from practicing law.

Article 4.

North Carolina State Bar.

84-16. Membership and privileges.

Sec.

84-17. Government.

84-18. Terms, election and appointment of councilors.

84-18.1. Membership and fees of district bars.

84-24. Admission to practice.

84-28. Discipline and disbarment.

84-28.1. Disciplinary hearing commission.

84-29. Evidence and witnesses.

84-32. Records and judgments and their effect; restoration of licenses.

84-34. Membership fees and list of members.

ARTICLE 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2. Persons disqualified.

No justice, judge, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy or assistant clerk of the General Court of Justice, nor register of deeds, nor sheriff, shall engage in the private practice of law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars (\$200.00). (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1965, c. 418, s. 1; 1969, c. 44, s. 59; 1973, c. 47, s. 2; c. 108, s. 36; 1981, c. 788, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "engage in the private practice of law" for "practice law" at the end of the first sentence.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

It shall be unlawful for any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document.

Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1; 1969, c. 718, s. 19; 1981, c. 762, s. 3.)

Effect of Amendments. — The 1981 amendment, inserted "or the" following "North Carolina Industrial Commission" and deleted

"or the Employment Security Commission" following "Utilities Commission" in the first sentence.

§ 84-4.1. Limited practice of out-of-state attorneys.

CASE NOTES

Purpose. — The purpose of this section is to afford the courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State. *North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc.*, 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, — N.C. —, 299 S.E.2d 629 (1982).

Conditions in the statute are mandatory; until they have been met, a court has no discretion to admit out-of-state counsel to practice before it. *North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc.*, 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, — N.C. —, 299 S.E.2d 629 (1982).

United States Constitution does not protect pro hac vice proceedings. *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Procedural due process is not required in the granting or denial of petitions to practice pro hac vice in the courts of another state. *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

It is not a right but a discretionary privilege which allows out-of-state attorneys to appear pro hac vice in a state's courts without meeting the state's bar admission requirements. *In re Smith*, 301 N.C. 621, 272 S.E.2d 834 (1981).

Admission of counsel in this State pro hac vice is not a right but a discretionary privilege; it is permissive and subject to the sound discretion of the court. *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

When Court's Discretionary Power Invoked. — Unless and until an application under this section meets the requirements of

the statute, the court's discretionary power is not invoked. *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Proper Care Requires Employment of Licensed Counsel. — To exercise proper care a party must not only pay proper attention to the case himself, he must employ counsel who is licensed or entitled to practice in the court where the case is pending. *North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc.*, 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, — N.C. —, 299 S.E.2d 629 (1982).

Local Custom Does Not Abrogate Section. — The fact that a custom may have grown up among Virginia attorneys practicing near the North Carolina state line to ignore the requirements of this section in no way abrogates or excuses out-of-state counsel from complying with this section. *North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc.*, 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, — N.C. —, 299 S.E.2d 629 (1982).

Party cannot nullify this section merely by responding to actions of noncomplying out-of-state attorney in the courts of this State. *North Carolina Nat'l Bank v. Virginia Carolina Bldrs., Inc.*, 57 N.C. App. 628, 292 S.E.2d 135, rev'd on other grounds, — N.C. —, 299 S.E.2d 629 (1982).

No Right to Representation by Counsel Not Licensed in State. — Parties do not have a right to be represented in the courts of this State by counsel who are not duly licensed to practice in this State. *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Sufficiency of Declaration under Subdivision (1). — A declaration by an applicant that he is a member in good standing of the Bar of another state and is duly licensed and admitted to practice in that state is sufficient to meet the

requirements of subdivision (1) of this section. *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Statement of North Carolina Counsel Insufficient under Subdivision (2). — The requirement under subdivision (2) of this section cannot be met by substituting the statement of North Carolina counsel and the statement must be signed by the client. *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E.2d 393 (1982).

Association with Local Attorney. — Subdivision (5) of this section allows courts to control out-of-state counsel and assure compliance with the duties and responsibilities of an attorney practicing in the courts of this State, and the association of out-of-state counsel with a local attorney satisfies a reasonable interest of the courts in having a member of the Bar of this State responsible for the litigation; thus, this statute is specifically designed to insure that the court has ready jurisdiction over those appearing only occasionally before it by insuring that counsel who appear regularly before it participate in the case. *In re Smith*, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Requirement May Not Be Waived. — A trial judge cannot waive the requirement of subdivision (5) of this section which states that local counsel be associated before an out-of-state attorney is admitted to limited practice in the courts of this State

because unless and until subdivisions (1) through (5) are complied with, the court has no discretion whatever. *In re Smith*, 301 N.C. 621, 272 S.E.2d 834 (1981).

Same — Ineligible Attorney May Not Be Held In Contempt. — An out-of-state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by this section and the out-of-state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in North Carolina. *In re Smith*, 301 N.C. 621, 272 S.E.2d 834 (1981).

Denial of Motion for Admission Pro Hac Vice Is Interlocutory. — Order denying plaintiff's motion to reconsider order denying attorney's motion for admission pro hac vice is an interlocutory order and is not immediately appealable; it does not come within the statutory appeals in §§ 1-277(a) or 7A-27(d). *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Applied in *Pope v. Jacobs*, 51 N.C. App. 374, 276 S.E.2d 487 (1981).

Cited in *North Carolina Nat'l Bank v. Virginia Carolina Bldrs.*, — N.C. —, 299 S.E.2d 629 (1983).

ARTICLE 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. — For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Purpose of Section. — The purpose of this section was not to enlarge the number of addresses but rather to limit the number of counsel and time allowed a defendant's counsel in addressing the jury. *State v. McCaskill*, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Discretion of Court. —

This section gives the court the discretion to allow a greater number of addresses. *State v. McCaskill*, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Counsel May Argue Both Law and Fact. —

The general rule is that counsel may argue

all the evidence to the jury, as well as any reasonable inferences to be drawn from it. *Property Shop, Inc. v. Mountain City Inv. Co.*, 56 N.C. App. 644, 290 S.E.2d 222 (1982).

Wide latitude is given counsel. —

Counsels have a wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case supported by the evidence, and to argue the law as well as the facts. *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (1982).

Counsel may read or state, etc. —

Under this section, counsel, in his argument to the jury, is entitled to read or state to the jury a relevant statute or other rule of law so as to present his side of the case. *State v. Hall*, —

N.C. App. —, 299 S.E.2d 680 (1983).

Reading Portions of Final Pleadings. —

The defense counsel may read portions of the final pleadings in his argument to the jury at the discretion of the trial judge. *Gillespie v. Draughn*, 54 N.C. App. 413, 283 S.E.2d 548 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 805 (1982).

Counsel may not "travel outside the record," etc. —

The general rule is that counsel may argue all the evidence to the jury, which such inferences as may be drawn therefrom; but he may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Patton*, 45 N.C. App. 676, 263 S.E.2d 796 (1980).

It is proper to argue to jury to compensate at a certain amount per specific time period when there is evidence of continuous pain. *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231, cert. denied, 301 N.C. 239, 283 S.E.2d 135 (1980).

In a personal injury action, where plaintiff's evidence tended to show that during the period of time between the accident and trial he suffered pain "almost constantly" as a result of injury caused by the accident, counsel's per diem argument based on this period of time was appropriate. *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (1982).

Cautionary Instruction Where "Per Diem" Argument Used. —A "per diem" argument that the jury consider a formula by which a monetary value is assigned to a particular unit of time and this value is multiplied by the total number of such units during which the pain persisted is permissible, but when it is used the trial judge should give appropriate cautionary jury instructions. *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (1982).

Applied in *State v. Erby*, 56 N.C. App. 358, 289 S.E.2d 86 (1982).

Cited in *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981); *State v. Carr*, 54 N.C. App. 309, 283 S.E.2d 175 (1981).

ARTICLE 4.

North Carolina State Bar.

Repeal of Article. —

Session Laws 1981, c. 788, s. 6, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

Cited in *North Carolina State Bar v. Frazier*, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 84-16. Membership and privileges.

The membership of the North Carolina State Bar shall consist of two classes, active and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the Council as hereinafter provided. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute.

Inactive members shall be judges and justices of the General Court of Justice and all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

All active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3; 1969, c. 44, s. 60; c. 1190, s. 52; 1973, c. 1152, s. 1; 1981, c. 788, s. 2; 1983, c. 589, s. 1.)

Editor's Note. — Session Laws 1983, c. 589, s. 2, provides that judges and justices made inactive members of the State Bar by the act shall be deemed to become inactive members as of January 1, 1982.

Effect of Amendments. — The 1981 amendment substituted "All" for "Only" at the

beginning of the first sentence of the fourth paragraph.

The 1983 amendment, effective June 23, 1983, inserted "judges and justices of the General Court of Justice and" near the beginning of the third paragraph.

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district

bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district.

In addition to the 50 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2; 1981, c. 788, s. 3.)

Effect of Amendments. —

The 1981 amendment added the third paragraph.

§ 84-18. Terms, election and appointment of councilors.

(c) Public members shall serve three-year terms. No public member shall serve more than two complete consecutive terms. (1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3; 1981, c. 788, s. 4.)

Only Part of Section Set Out. — As the rest

of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment added subsection (c).

§ 84-18.1. Membership and fees of district bars.

(a) The district bar shall be a subdivision of the North Carolina State Bar and may adopt rules, regulations and bylaws that are not inconsistent with this Article. A copy of any rules, regulations and bylaws that are adopted, along with any subsequent amendments, shall be transmitted to the Secretary-Treasurer of the North Carolina State Bar.

(b) Any district bar may from time to time by a majority vote of its membership prescribe an annual membership fee to be paid by its active members as a service charge to promote and maintain its administration, activities and programs. Such fee shall be in addition to, but shall not exceed, the amount of the membership fee prescribed by G.S. 84-34 for active members of the North Carolina State Bar. Every active member of a district bar which has prescribed an annual membership fee shall keep its secretary-treasurer notified of his correct mailing address and shall pay the prescribed fee at the time and place set forth in the demand for payment mailed to him by its secretary-treasurer. The name of each active member of a district bar who shall be more than 12 full calendar months in arrears in the payment of any such fee shall be furnished by the secretary-treasurer of the district bar to the council of the North Carolina State Bar. In the exercise of its powers as set forth in G.S. 84-23, the council shall thereupon take such disciplinary or other action with reference to the delinquent as it considers necessary and proper. (1969, c. 241; 1983, c. 390, s. 1.)

Effect of Amendments. — The 1983 amendment, effective May 26, 1983, designated the

existing language as subsection (b) and added subsection (a).

§ 84-21. Organization of council; publication of rules, regulations and bylaws.

CASE NOTES

Cited in *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 84-23. Powers of council.

CASE NOTES

Cited in *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982); *North Carolina State Bar v. Frazier*, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 84-24. Admission to practice.

The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this Article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The Board of Law Examiners shall elect a member of said Board as chairman thereof, and the Board may employ an executive secretary and provide such assistance as may be required to enable said Board to perform its duties promptly and properly. The chairman and any employees shall serve for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly.

All applicants for admission to the Bar shall be fingerprinted to determine whether the applicant has a record of criminal conviction in this State or in any other state or jurisdiction. The information obtained as a result of the fingerprinting of an applicant shall be limited to the official use of the Board of Law Examiners in determining the character and general fitness of the applicant.

The Board of Law Examiners, subject to the approval of the council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2; 1983, c. 177.)

Effect of Amendments. — The 1983 amendment, effective April 18, 1983, added the present sixth paragraph.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

The constitutional power to establish the qualifications for admission to the bar rests in the legislature, which may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. *Bowens v. Board of Law Exmrs.*, 57 N.C. App. 78, 291 S.E.2d 170 (1982).

The determination of proficiency is a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the board, which does no violence to constitutional principle. *Bowens v. Board of Law Exmrs.*, 57 N.C. App. 78, 291 S.E.2d 170 (1982).

Purpose of Board. — The Board of Law Examiners was created for the purpose of examining applicants and providing rules and regulations for admission to the bar. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Character Evaluation and Examination Are Separate and Distinct Requirements. — In an action to obtain admission to the North Carolina Bar, it was found that the Board of Law Examiners properly advised the applicant for admission to the practice of law that he

would be permitted to take the bar examination but that the result would be sealed until the board has concluded its character evaluation, and the board was not required subsequently to divulge applicant's examination result, since the result was irrelevant to the matter of applicant's character evaluation, and even if applicant failed the examination, this appeal would not be moot since it concerned applicant's character, a separate and distinct matter. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Board's Duty to Resolve Factual Disputes. —

In determining an applicant's fitness to practice law, the Board of Law Examiners should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and, without a finding that he committed the prior acts, use his denial that he committed them as substantive evidence of his lack of moral character; rather, the board should first determine whether in fact the applicant committed the prior acts of misconduct and, if it determines that he did, it must then say whether these acts so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character. In re Moore, 301 N.C. 634, 272 S.E.2d 826 (1981).

Burden of Proving Specific Acts of Misconduct. —

When an applicant makes a prima facie

showing of good moral character and the board, to rebut the showing, relies on specific acts of misconduct the commission of which are denied by the applicant, the board must prove the specific acts by the greater weight of the evidence. In *re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, it was found that a finding of fact by the Board of Law Examiners that applicant "made false statements under oath on matters material to his fitness of character" inadequately resolved the factual issue which it addressed and was too vague to permit appropriate judicial review because the board did not indicate which statements it considered to be untruthful; consequently, neither a reviewing court nor the applicant could be certain as to the content or materiality of the false statements referred to, and the board could not meet its burden of proving specific acts of misconduct without setting out with specificity what they were and that they had been proved by the greater weight of the evidence. In *re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981).

Sufficiency of Findings. — Where an applicant for admission to the practice of law had been convicted of assault and murder, finding by the Board of Law Examiners that applicant did not disclose that he had been convicted of assault and battery on a female failed adequately to resolve the factual issue to which it was addressed where the factual issue before the board was whether the omission was a mere inadvertence caused by applicant's initial failure to recall the conviction as an incident separate from the murder or was instead a purposeful omission designed to mislead the board, the later correction of which was

prompted only by notice of the hearing. In *re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981).

In an action to obtain admission to the North Carolina Bar, the court on appeal could not conclude that as a matter of law the Board of Law Examiners' evidence was insufficient to support findings of fact which could rebut a prima facie showing of good moral character by an applicant for admission to the bar where it was undisputed that applicant had committed and been convicted of murder and assault; the question before the board was whether these acts occurring 14 years ago continued to constitute evidence that applicant was presently morally unfit to practice law; and only the board through proper findings of fact and conclusions of law based thereon could answer the question as to whether events subsequent to the murder and assault demonstrated to the board that applicant had been fully rehabilitated so that the evidentiary force of the 14 year old offenses was spent or whether they led to a contrary conclusion. In *re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981).

Findings Not Prejudicial. — An applicant for admission to practice law was not prejudiced where the Board of Law Examiners found that applicant was paroled after serving a portion of his prison term but the board failed to find that applicant was completely discharged from parole, since the reviewing court would take into account, under a whole record review, undisputed facts which favored applicant's position including the fact of discharge from parole which applicant argued was unfairly omitted from the board's findings. In *re Moore*, 301 N.C. 634, 272 S.E.2d 826 (1981).

Cited in *re Elkins*, — N.C. —, 302 S.E.2d 215 (1983).

§ 84-28. Discipline and disbarment.

(c) Misconduct by any attorney shall be grounds for:

(1) Disbarment; or

(2) Suspension for a period not exceeding three years, any portion of which may be stayed for a period not exceeding three years upon reasonable conditions to which the offending attorney consents; or

(3) Public censure; or

(4) Private reprimand.

Any order disbarring or suspending an attorney may impose reasonable conditions precedent to reinstatement.

(1933, c. 210, s. 11; 1937, c. 51, s. 3; 1959, c. 1282, ss. 1, 2; 1961, c. 1075; 1969, c. 44, s. 61; 1975, c. 582, s. 5; 1979, c. 570, ss. 6, 7; 1983, c. 390, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 amendment, effective May 26, 1983, inserted "any portion of which may be

stayed for a period not exceeding three years upon reasonable conditions to which the offending attorney consents" in subdivision (c)(2) and added the last sentence of subsection (c).

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

The practice of law is a property right requiring due process of law before it may be impaired. *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

But Due Process Does Not Require Trial by Jury. — Defendant was not deprived of due process of law by virtue of the elimination by the 1975 amendment to this section of the right to trial by jury in attorney disciplinary matters; due process does not require that a jury trial be afforded an attorney for disciplinary or disbarment procedures and the procedural safeguards provided by the 1975 amendments were sufficient to satisfy due process requirements. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

Application of the procedures included in the 1975 amendment to this section did not constitute an unconstitutional ex post facto application of the law. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Right to Practice Law Not Interfered with. — This section only establishes procedures by which an attorney may be disciplined in the event that he violates the standards of professional conduct. Without some wrongful action on the part of an attorney, this section in no way interferes with an attorney's right to practice law. *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

While the practice of law is a property right requiring due process of law before it may be impaired, the 1975 amendment to this section in no way interfered with or impaired defendant's right to practice law. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Effective Date of 1975 Amendment. — The legislature intended the 1975 amendment to

this section, S.L. 1975, c. 582, s. 5, to apply to disciplinary hearings commenced on or after 1 July 1975, the effective date. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Civil Action. —

Disciplinary proceedings against attorneys in North Carolina are civil proceedings, not criminal. *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

Public Censure Held Appropriate. — An order of public censure was not arbitrary and unreasonably harsh punishment for defendant attorney's unprofessional conduct in encouraging a potential adverse witness not to testify against his client, in a prosecution for driving under the influence of alcohol, in return for an agreement by the client not to give any testimony which might incriminate the potential witness, and it did not violate the defendant's rights to due process and equal protection. *North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Appeals from Decisions of State Bar Disciplinary Hearing Commission. — Article 4 of Chapter 150A (§ 150A-43 et seq.) is the controlling judicial review statute for appeals from decisions of the State Bar Disciplinary Hearing Commission. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Test on Appeal. — Due process does not require the "clear, cogent and convincing" test in determining whether plaintiff satisfied its burden of proof rather than the "greater weight of the evidence" rule. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Power of Reviewing Court to Change Discipline. — Subsection (h) of this section does not give a reviewing court the authority to modify or change the discipline properly imposed by the commission. *North Carolina State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982).

Cited in *North Carolina State Bar v. Frazier*, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 84-28.1. Disciplinary hearing commission.

(b1) The disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, acting through its chairman, shall have the power to hold persons, firms or corporations in contempt as provided in Chapter 5A. (1975, c. 582, s. 6; 1979, c. 570, s. 8; 1983, c. 390, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective May 26, 1983, added subsection (b1).

CASE NOTES

Quoted in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

Cited in North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

§ 84-29. Evidence and witnesses.

In any investigation of charges of professional misconduct, incapacity or disability the council and any committee thereof, and the disciplinary hearing commission, and any committee thereof, may administer oaths and affirmations and shall have the power to subpoena and examine witnesses under oath, and to compel their attendance, and the production of books, papers and other documents or writings deemed by it necessary or material to the inquiry. Each subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee or a hearing committee of the disciplinary hearing commission through its chairman pursuant to the procedures set out in Chapter 5A, but with the right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings, but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof, or the disciplinary hearing commission or any committee thereof, or by deposition, shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof or the disciplinary hearing commission or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12; 1959, c. 1282, s. 2; 1975, c. 582, s. 7; 1983, c. 390, s. 6.)

Effect of Amendments. — The 1983 amendment, effective May 26, 1983, inserted "or a hearing committee of the disciplinary hearing

commission through its chairman pursuant to the procedures set out in Chapter 5A" in the second sentence of the first paragraph.

§ 84-30. Rights of accused person.

Cited in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 84-32. Records and judgments and their effect; restoration of licenses.

(a) In cases heard by the disciplinary hearing commission or any committee thereof, a complete record of the proceedings and evidence shall be made and preserved in the office of the secretary-treasurer. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court in the district wherein the accused resides or practices law, and also upon the minutes of the Supreme Court of North Carolina; and such judgment shall be effective throughout the State.

(b) Whenever any attorney desires to voluntarily surrender his license, he must tender his license and a written resignation to the council. The council, in its discretion, may accept such a tender with or without conditions, or reject such a tender. In the event such a tender is accepted, the council shall either enter an Order of Discipline or refer the matter to the disciplinary hearing commission for hearing in accordance with the rules and regulations prescribed by the council. The hearing committee of the disciplinary hearing commission may enter a final Order of Discipline or, if directed by the council, make a recommendation back to the council. A copy of any Order of Discipline shall be filed with the Clerk of the Supreme Court and with the clerk of the superior court of the county of residence or prior residence of the licensee or the county in which the attorney maintains an office for the practice of law.

(c) Whenever any attorney has been deprived of his license by suspension or disbarment, the council or the disciplinary hearing commission or the Secretary-Treasurer may, in accordance with rules and regulations prescribed by the council, restore the license upon due notice being given and satisfactory evidence produced of proper reformation of the licentiate and of satisfaction of any conditions precedent to restoration. (1933, c. 210, s. 15; 1935, c. 74, s. 2; 1953, c. 1310, s. 4; 1959, c. 1282, s. 2; 1975, c. 582, s. 10; 1983, c. 390, s. 5.)

Effect of Amendments. — The 1983 amendment, effective May 26, 1983, designated the existing provisions as subsection (a) and

rewrote the second and third paragraphs as present subsections (b) and (c).

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, beginning with the year 1982, pay to the secretary-treasurer an annual membership fee of ninety dollars (\$90.00), and every member shall notify the secretary-treasurer of his correct post-office address. All dues for prior years shall be as were set forth in the General Statutes then in effect. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this Article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of January of the calendar year following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transaction of the council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the

North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4; 1961, c. 760; 1971, c. 18; 1973, c. 476, s. 193; c. 1152, s. 4; 1977, c. 841, s. 2; 1981, c. 788, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "1982" for "1975" and "ninety dollars (\$90.00)" for "seventy-five dollars (\$75.00)" in the first sentence of the first paragraph, and substituted "January of the calen-

dar year" for "July of the second calendar year (a 'calendar year' for the purposes of this Article being treated as the period from January 1 to December 31)" in the proviso in the fourth sentence of the first paragraph.

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

Legal Periodicals. —

For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

Chapter 85B.

Auctions and Auctioneers.

Sec.

85B-1. Definitions.

85B-2. Activities governed by Chapter.

85B-3. Auctioneers Commission.

85B-4. Licenses required.

85B-4.1. Auctioneer Recovery Fund.

85B-4.2. Special provisions.

Sec.

85B-5. Licensing of nonresidents.

85B-6. Fees; local governments not to charge fees or require licenses.

85B-8. Prohibited acts; suspension or revocation of license.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Repeal of Chapter. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Chapter effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 85B-1. Definitions.

For the purposes of this Chapter the following definitions shall apply:

- (3) "Owner" means the bona fide owner of the property being offered for sale; in the case of corporations, "owner" means an officer or director of a corporation that owns the property being offered for sale and that is qualified to do business in the State of North Carolina. (1973, c. 552, s. 1; 1983, c. 751, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Aug. 1, 1983, added subdivision (3).

§ 85B-2. Activities governed by Chapter.

This Chapter shall apply to all auctions held in this State except the following:

- (1) Sales at auction conducted by the owner of all of the goods or real estate being offered, or an attorney representing the owner, unless the owner's regular course of business includes engaging in the sale of goods or real estate by means of auction or unless the owner originally acquired the goods for the purposes of resale at auction;
- (7) Sale at auction of automobiles conducted under the provisions of G.S. 20-77, or sale at auction of motor vehicles by a motor vehicle dealer licensed under Article 12, Chapter 20 of the General Statutes; (1973, c. 552, s. 2; 1977, c. 1115; 1983, c. 751, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Aug. 1, 1983, rewrote subdivisions (1) and (7).

§ 85B-3. Auctioneers Commission.

(a) There shall be a five-member North Carolina Auctioneers Commission having the powers and responsibilities set out in this Chapter. The Governor shall appoint the members of the Commission, at least three of whom, and their successors, shall be from nominations submitted by the Auctioneers Association of North Carolina. The Auctioneers Association shall submit, within 45 days of when the vacancy occurs, at least three names for each position for which it is entitled to make a nomination. Of the initial five members of the Commission one shall be appointed for a one-year term, two shall be appointed for two-year terms and two for three-years terms; thereafter, each new member shall be appointed for a term of three years. Any vacancy shall be filled for the remainder of the unexpired term only. Each member shall continue in office until his successor is appointed and qualified. No member shall serve more than two complete consecutive terms.

(b) At least three members of the Commission shall be experienced auctioneers who are licensed under this Chapter. One member shall be a person who shall represent the public at large and shall not be licensed under this Chapter. The Governor shall appoint a public member to fill the first vacancy on the Commission after July 1, 1983.

(1973, c. 552, s. 3; 1975, c. 648, s. 1; 1983, c. 751, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective Aug. 1, 1983, added the last sentence of subsection (a) and rewrote subsection (b).

§ 85B-4. Licenses required.

(b) No person shall be licensed as an apprentice auctioneer or as an auctioneer if he:

- (1) Is under 18 years of age;
- (2) Repealed by Session Laws 1983, c. 751, s. 6, effective August 1, 1983.
- (3) Has within the preceding five years pleaded guilty to or been convicted of any felony; or
- (4) Has had an auctioneer or apprentice auctioneer license revoked.

(c1) Each apprentice auctioneer application and license shall name a licensed auctioneer to serve as the supervisor of the apprentice. No apprentice auctioneer may enter into an agreement to conduct an auction, or conduct an auction, without the express approval of his supervisor. The supervisor shall regularly review the records his apprentice is required to maintain under G.S. 85B-7 and see that they are accurate and current.

(e) Each license issued under this Chapter shall be valid from July 1 of the year issued, or from the date issued, whichever is later, to June 30 of the succeeding year and may be renewed for one year at a time, except an apprentice auctioneer license may not be renewed for more than three times. No examination shall be required for renewal of an auctioneer license if the application for renewal is made within 12 months of the expiration of the previous license.

(f) No person shall be issued an auctioneer or apprentice auctioneer license until he has made the contribution to the Auctioneer Recovery Fund as required by G.S. 85B-4.1.

(1973, c. 552, s. 4; c. 1195, ss. 1, 2; 1975, c. 648, ss. 2-4; 1983, c. 603, s. 4; c. 751, ss. 6-8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The first 1983 amendment, effective July 1, 1983, rewrote subsection (f).

The second 1983 amendment, effective Aug. 1, 1983, deleted subdivision (2) of subsection (b), which read "Is not a resident of North Carolina," added subsection (c1), and substituted "12 months" for "90 days" in the second sentence of subsection (e).

§ 85B-4.1. Auctioneer Recovery Fund.

(a) In addition to the license fees provided for above, upon the application for a license and upon renewal of every license and every regular renewal date thereafter, the Commission shall charge each and every licensee an amount not to exceed fifty dollars (\$50.00) per year to be included in the Auctioneer Recovery Fund (hereinafter the Fund).

(b) The purposes of the Fund shall be as follows:

- (1) When an auctioneer or apprentice auctioneer has been found guilty of violating any of the provisions of G.S. 85B or the rules promulgated thereunder, and upon the entry of a final agency decision by the Commission or if appealed, a court order, the Commission is authorized to pay the aggrieved party or parties an aggregate amount not to exceed ten thousand dollars (\$10,000) against any one auctioneer or apprentice auctioneer, provided that the auctioneer or apprentice auctioneer has refused to pay such claim within a period of 20 days of entry of the final agency decision or court order and provided further that the amount or amounts of money in question are certain and liquidated.
- (2) The Commission shall maintain a minimum level of one hundred thousand dollars (\$100,000) for recovery and guaranty purposes. These funds may be invested and reinvested by the State Treasurer in interest bearing accounts, such interest accrued being added to the Fund. Sufficient liquidity will be maintained so that there will be money available to satisfy any and all claims which may be processed through the Board. The Fund may be disbursed by a warrant drawn against the State Treasurer or other method at the discretion of the State Treasurer.
- (3) The Commission, in its discretion, may use any and all funds in excess of one hundred thousand dollars (\$100,000) for the following purposes:
 - a. To carry out the advancement of education and research in the auctioneering profession for the benefit of those licensed under the provisions of this Chapter and the improvement of and making even more efficient the industry as such;
 - b. To underwrite educational seminars, training centers, and other forms of educational projects for the use and benefit generally of licensees;
 - c. To sponsor, contract for and to underwrite any and all other educational and research projects of a similar nature having to do with the advancement of the auctioneer profession in North Carolina; and
 - d. To cooperate with associations of auctioneers and any and all other groups for the enlightenment and advancement of the auctioneer profession of North Carolina. (1983, c. 603, s. 2.)

Editor's Note. — Session Laws 1983, c. 603, s. 7, makes this section effective July 1, 1983.

Section 3 of the act provides that until such time as the Fund reaches the minimum level set out in s. 2, the Commission shall not be authorized to disburse any payments to an

aggrieved party, but that any party aggrieved and awarded payment by a final agency decision dated after July 1, 1983, shall hold a vested right for payment once the Fund reaches the minimum level.

§ 85B-4.2. Special provisions.

(a) In the event that an auctioneer or apprentice auctioneer is found guilty of any of the provisions of G.S. 85B or the rules promulgated thereunder, and if the amount of money lost by the aggrieved party or parties is in dispute or cannot be determined accurately, then the amount of damages shall be determined by the superior court in the county where the alleged violation took place, provided that the Board has previously determined that a violation of the license laws or rules and regulations has occurred and a final agency decision has been entered.

(b) If such final agency decision has been entered and the rights of the licensee have been finally adjudicated, then the superior court shall make a finding as to the monetary damages growing out of the aforesaid violation or violations. (1983, c. 603, s. 2.)

Editor's Note. — Session Laws 1983, c. 603, s. 7, makes this section effective July 1, 1983.

Section 3 of the act provides that until such time as the Fund reaches the minimum level set out in s. 2, the Commission shall not be authorized to disburse any payments to an

aggrieved party, but that any party aggrieved and awarded payment by a final agency decision dated after July 1, 1983, shall hold a vested right for payment once the Fund reaches the minimum level.

§ 85B-5. Licensing of nonresidents.

Any person who holds a valid auctioneer license in another state may apply for and be granted a North Carolina license if the state in which he is licensed has standards which are acceptable to the Commission but are not more lenient than those required by this Chapter. An applicant under this section shall not be required to take the examination required under G.S. 85B-4 but shall pay the appropriate fee under G.S. 85B-6 and shall file with the Commission an irrevocable consent that service on the secretary of the Commission shall be sufficient service of process for actions against the applicant by a resident of this State arising out of his auctioneering activities.

An applicant under this section shall file the bond required by G.S. 85B-4. Any license issued under this section shall be marked to indicate that its holder is a nonresident. (1973, c. 552, s. 5; 1983, c. 603, s. 5; c. 751, ss. 9-11.)

Effect of Amendments. — The first 1983 amendment, effective July 1, 1983, substituted "meet the requirements of G.S. 85B-4.1" for "file the bond required under G.S. 85B-4" in the first sentence of the second paragraph.

The second 1983 amendment, effective Aug. 1, 1983, substituted the language beginning "has standards which" for "provides similar recognition to a license granted by this State" in the first sentence of the first paragraph,

rewrote the first sentence of the second paragraph, which read "An applicant under this section shall not be required to file the bond required under G.S. 85B-4 if he is currently bonded as an auctioneer or apprentice auctioneer in his home state," and deleted the third paragraph, relating to licensing of auctioneers who are residents of Virginia or South Carolina.

§ 85B-6. Fees; local governments not to charge fees or require licenses.

The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following: fifty dollars (\$50.00) for application for apprentice auctioneer license; twenty-five dollars (\$25.00) for apprentice auctioneer license for one year; twenty-five dollars (\$25.00) for application for auctioneer license and for examination; one hundred dollars (\$100.00) for auctioneer license for one year; seventy-five dollars (\$75.00) for designation as licensed auctioneer business.

No local government or agency of local government may charge any fees or require any licenses for auctioneers, apprentice auctioneers, or auctioneer businesses in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess., c. 1219, s. 43.7; 1983, c. 751, s. 12.)

Effect of Amendments. — The 1983 amendment, effective Aug. 1, 1983, rewrote the second paragraph, which read "No local government or agency of local government may charge any

auctioneer fees or require any auctioneer licenses in addition to those set out in this Chapter."

§ 85B-8. Prohibited acts; suspension or revocation of license.

(a) The following shall be grounds for suspension or revocation of an auctioneer or apprentice auctioneer license:

- (1) Any violation of this Chapter or any violation of a rule or regulation duly adopted by the Commission;
- (2) A continued and flagrant course of misrepresentation or making false promises, either by the auctioneer or by someone acting in his behalf and with his consent;
- (3) Any failure to account for or to pay over within a reasonable time, not to exceed 30 days, money belonging to another which has come into the auctioneer's possession through an auction sale;
- (4) Any misleading or untruthful advertising;
- (5) Any act of conduct in connection with a sales transaction which demonstrates bad faith or dishonesty;
- (6) Knowingly using false bidders, cappers or pullers, or making a material false statement for license;
- (7) Commingling the money or property of a client with his own or failing to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association located in North Carolina money received for another person through sale at auction.
- (8) Failure to make the required contribution to the Auctioneer Recovery Fund.

(1973, c. 552, s. 8; c. 1195, ss. 4, 5; c. 1331, s. 3; 1975, c. 648, s. 6; 1983, c. 603, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, added subdivision (a)(8).

Chapter 85C.

Bail Bondsmen and Runners.

Sec.

85C-12. License fees.

85C-41. [Repealed.]

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Repeal of Chapter. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Chapter effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 85C-7. Arrest of defendant for purpose of surrender.

Legal Periodicals. — For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

CASE NOTES

Codification of Common Law. — The bondsman's right of arrest under this section is simply a codification of the common-law rule that has been recognized in North Carolina for many years. *State v. Perry*, 50 N.C. App. 540, 274 S.E.2d 261, cert. denied and appeal dismissed, 302 N.C. 632, 280 S.E.2d 446 (1981).

Miranda Warnings Not Required. — When taking a defendant who is a bail jumper

into custody, a bail bondsman is not acting as a law officer or as an agent for the State, and the bondsman has no obligation to give defendant the Miranda warnings in order to render admissible incriminating statements made by defendant to the bondsman. *State v. Perry*, 50 N.C. App. 540, 274 S.E.2d 261, cert. denied and appeal dismissed, 302 N.C. 632, 280 S.E.2d 446 (1981).

§ 85C-12. License fees.

A license fee of sixty dollars (\$60.00) shall be paid to the Commissioner with each application for license as a professional bondsman and a license fee of twenty dollars (\$20.00) shall be paid to the Commissioner with each application for license as a runner. (1963, c. 1225, s. 12; 1975, c. 619, s. 1; 1983, c. 790, s. 11.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, substituted "sixty dollars (\$60.00)" for "thirty dollars (\$30.00)"

and substituted "twenty dollars (\$20.00)" for "ten dollars (\$10.00)."

§ 85C-41: Repealed by Session Laws 1983, c. 742, s. 3, effective September 1, 1983.

Editor's Note. — Session Laws 1983, c. 742, s. 4, provides that the act shall not affect any bonds outstanding on Sept. 1, 1983.

Chapter 86A.

Barbers.

Sec.

86A-3. Qualifications for certificate as a registered barber.

86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

86A-5. Powers and duties of the Board.

86A-6. Office; seal; officers and executive secretary; funds.

86A-7. Salary and expenses; employees; audits; annual reports to the Governor.

Sec.

86A-10. Issuance of certificates of registration.

86A-11. Temporary permits.

86A-12. Applicants licensed in other states.

86A-17. Renewal or restoration of certificate.

86A-18. Disqualifications for certificate.

86A-20. Misdemeanors.

86A-22. Licensing and regulating barber schools and colleges.

86A-23. Instructors.

86A-24. Apprenticeship.

86A-25. Fees collectable by Board.

Repeal of Chapter. —

Session Laws 1981, c. 457, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Chapter. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 86A-3. Qualifications for certificate as a registered barber.

A certificate of registration as a registered barber shall be issued by the Board to any person who meets the following qualifications:

(3) Has passed a clinical examination conducted by the Board; and

(4) Has submitted to the Board the signatures of three barbers registered in North Carolina, one of whom has supervised the applicant, certifying that the applicant has served the apprenticeship required by subsection (2). (1929, c. 119, ss. 3, 4, 11; 1941, c. 375, s. 3; 1961, c. 577, s. 1; 1979, c. 695, s. 1; 1981, c. 457, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment rewrote subdivision (3) and added subdivision (4).

§ 86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

(a) The State Board of Barber Examiners is established to consist of four members appointed by the Governor. Three shall be licensed barbers; the other shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) All members serving on the Board on June 30, 1981, shall complete their respective terms. The Governor shall appoint the public member not later than July 1, 1981. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is appointed and qualifies.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms. (1929, c. 119, s. 6; 1979, c. 695, s. 1; 1981, c. 457, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote the former first sentence as subsections (a) and (b), designated the former

second sentence as subsection (c), and in subsection (c) inserted "may" preceding "appoint members."

§ 86A-5. Powers and duties of the Board.

(a) The Board has the following powers and duties:

- (1) To see that inspections of barbershops and schools are conducted to determine compliance with sanitary regulations. The Board may appoint inspectors as necessary;
- (2) To adopt sanitary regulations concerning barber schools and shops and procedural rules in accordance with the guidelines established in G.S. 86A-15;
- (3) To review the barber licensing laws of other states and to determine which are the substantive equivalent of the laws of North Carolina for purposes of G.S. 86A-12;
- (4) To conduct examinations of applicants for certificate of registration as registered barber, registered apprentice and barber school instructor.

(b) The Board shall adopt regulations:

- (1) Prohibiting the use of commercial chemicals of unknown content by persons registered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public;
- (2) Instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(c) Each Board member shall submit periodic reports to the Board concerning his activities in carrying out duties as a Board member. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, ss. 3, 4.)

Effect of Amendments. — The 1981 amendment added the subsection designation "(a)," in subdivision (a)(3) substituted "the substantive equivalent of" for "substantially similar" to

and "purposes of G.S. 86A-12" for "reciprocity purposes," added subsection (b), and substituted the subsection designation "(c)" for the subdivision designation "(5)."

§ 86A-6. Office; seal; officers and executive secretary; funds.

The Board shall maintain a suitable office in Raleigh, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall elect its own officers, and in addition, may elect or appoint a full-time executive secretary who shall not be a member of the Board, and whose salary shall be fixed by the Board. The executive secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this Chapter, the funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this Chapter. Nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this Chapter and received by the State Treasurer pursuant to the provisions of this section. (1929, c. 119, ss. 7, 14; 1937, c. 138, s. 4; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c. 830, ss. 2, 4; 1951,

c. 821, s. 1; 1957, c. 813, ss. 1, 3; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1398; 1979, c. 695, s. 1; 1981, c. 884, s. 5; 1983, c. 717, s. 15.)

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1981 amendment deleted the former third sentence,

relating to the bond of the executive secretary.

The 1983 amendment, effective July 11, 1983, substituted "Board" for "Governor with the approval of the Advisory Budget Commission" at the end of the second sentence.

§ 86A-7. Salary and expenses; employees; audits; annual reports to the Governor.

(c) Repealed by Session Laws 1981, c. 884, s. 6.

(d) Repealed by Session Laws 1983, c. 913, s. 8, effective July 22, 1983.

(1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2; 1979, c. 695, s. 1; 1981, c. 884, s. 6; 1983, c. 913, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment deleted subsection (c), relating to bonds of members of the Barber Examiners.

The 1983 amendment, effective July 22, 1983, deleted subsection (d), which provided for an annual audit and examination of the receipts and disbursements of the State Board of Barber Examiners by the State Auditor.

§ 86A-10. Issuance of certificates of registration.

Whenever the provisions of this Chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1; 1981, c. 457, s. 5.)

Effect of Amendments. — The 1981 amendment corrected an error which had already been corrected in the replacement volume, by

substituting "complied" for "compiled" near the beginning of the section.

§ 86A-11. Temporary permits.

(a) The Board may grant a temporary permit to work to a graduate of a barber school in North Carolina provided application for examination has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for apprenticeship registration except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board. The permittee may operate only under the supervision of a licensed barber.

(d) The Board may grant a temporary permit to work to persons licensed in another state and seeking permanent licensure in North Carolina under G.S. 86A-12. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, ss. 6, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration" for "barber license" in the second sentence of

subsection (a), substituted "under G.S. 86A-12" for "provided application for examination has been filed and fee paid" at the end of subsection (d), and deleted a former second sentence in subsection (d) that provided the length of time for which the temporary permits were valid.

§ 86A-12. Applicants licensed in other states.

The Board shall issue a license to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

- (1) He is currently an active, competent practitioner in good standing; and
- (2) He has practiced at least three out of the five years immediately preceding his application; and
- (3) He currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 86A-3. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 86A-17. Renewal or restoration of certificate.

(b) A registered barber whose certificate of registration has expired may have his certificate restored immediately upon paying the required registration fee and furnishing a health certificate if required by the Board; provided, however, a registered barber whose certificate has expired for a period of five years shall be required to take the clinical examination prescribed by the State Board of Barber Examiners and otherwise comply with the provisions of this Chapter before engaging in the practice of barbering. No registered barber who is reissued a certificate under this subsection shall be required to serve an apprenticeship as a prerequisite to reissuance of his certificate.

(1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5; 1973, c. 605; 1979, c. 695, s. 1; 1981, c. 457, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment inserted "clinical" preceding "examination prescribed" in the proviso in the first sentence of subsection (b), and added the second sentence in subsection (b).

§ 86A-18. Disqualifications for certificate.

The Board may either refuse to issue or to renew, or may suspend or revoke any certificate of registration or barbershop permit or barber school permit for any one or combination of the following causes:

- (1) Conviction of the applicant or certificate holder of a felony proved by certified copy of the record of the court conviction;
- (5) The commission of any of the offenses described in subdivisions (3), (5), and (6) of G.S. 86A-20;
- (7) The violation of the rules and regulations pertaining to barber schools, provided that the Board has previously given two written warnings to the school. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6; 1961, c. 477, s. 4; 1979, c. 695, s. 1; 1981, c. 457, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment inserted "applicant or" near the middle of subdivision (1), substituted "(6)" for "(7)" near

the end of subdivision (5), and corrected a misspelling in subdivision (7).

§ 86A-20. Misdemeanors.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars (\$10.00), nor more than fifty dollars (\$50.00), imprisonment for 30 days in jail, or both fine and imprisonment:

- (2) Obtaining or attempting to obtain a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations;

(1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10; 1951, c. 821, s. 2; 1971, c. 819; 1979, c. 695, s. 1; 1981, c. 457, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment inserted "the" following "other than" in subdivision (2), and deleted a comma following "fee" near the middle of subdivision (2).

§ 86A-22. Licensing and regulating barber schools and colleges.

The North Carolina State Board of Barber Examiners may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:

- (2) Each school shall have at least two instructors. Each instructor must hold a valid instructor's certificate issued by the Board.

- (4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina. The Board shall specify the minimum number of hours of instruction for each subject required by this subsection.

(1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment deleted "to properly instruct the number of students" at the end of the first sentence of subdivision (2) and added the second sentence in subdivision (4).

§ 86A-23. Instructors.

(a) The Board shall issue an instructor's certificate to any currently registered barber who has passed an instructor's examination given by the Board. This examination shall cover the subjects listed in G.S. 86A-22(4) and any other subjects which the Board deems necessary for the teaching of sanitary barbering.

(1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1; 1981, c. 457, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "86A-22(4)" for "86A-22(3)" in the second sentence of subsection (a).

§ 86A-24. Apprenticeship.

(a) Before being issued an apprentice license, an applicant must pass an examination conducted by the Board to determine his competence, including his knowledge of barbering, sanitary rules and regulations, and knowledge of diseases of the face, skin and scalp.

(b) An apprentice license may be renewed annually on the payment of the prescribed fee. The certificate of registration of an apprentice is valid only so long as he works under supervision of a registered barber. No apprentice shall operate a barbershop.

(c) On completion of at least one year's apprenticeship, evidenced by affidavit of the supervising registered licensed barber or barbers, and upon meeting the other requirements of G.S. 86A-3, the apprentice shall be issued a license as a registered barber, pursuant to G.S. 86A-10. No registered apprentice may practice for a period exceeding three years without retaking and passing the required examination to receive a certificate as a registered apprentice. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1; 1981, c. 457, s. 14.)

Effect of Amendments. — The 1981 amendment added subsection (a), redesignated former subsection (a) as present subsection (b), substituted "he" for "the apprentice" in the second sentence of subsection (b), deleted "registered" preceding "apprentice" in the third sentence of subsection (b), deleted former subsection (b) which read "It is the responsibility of a

supervising licensed registered barber to properly supervise his apprentices," rewrote the former first two sentences of subsection (c) as the first sentence of subsection (c), in the second sentence of subsection (c) substituted "exceeding" for "of more than," inserted "retaking and," and substituted "apprentice" for "barber" at the end of that sentence.

§ 86A-25. Fees collectable by Board.

The State Board of Barber Examiners shall charge fees not to exceed the following:

Certificate of registration or renewal as a barber	\$ 20.00
Certificate of registration or renewal as an apprentice barber	20.00
Barbershop permit or renewal	20.00
Examination to become a registered barber	40.00
Examination to become a registered apprentice barber	40.00
Restoration of an expired certificate of a registered apprentice, registered barber or barbershop permit within the first year \$10.00 plus renewal fee; after the first year \$20.00 plus lapsed fees up to 5 years	

Examination to become a barber school instructor	\$ 85.00
Student permit	10.00
Issuance of any duplicate copy of a license, certificate or permit	5.00
Barber school permit	50.00
Barber school instructor certificate or renewal	35.00
Inspection of newly established barbershop	60.00
Inspection of newly established barber school	100.00
Issuance of a registered or apprentice certificate by certification	60.00

(1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, ss. 4, 8; 1951, c. 821, s. 1; 1957, c. 813, s. 3; 1961, c. 577, s. 5; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1331, s. 3; c. 1398; 1979, c. 695, s. 1; 1981, c. 753.)

Effect of Amendments.— The 1981 amendment, effective Oct. 1, 1981, substituted “fees not to exceed the following” for “and collect the following fees” in the introductory clause, inserted “within the first year \$10.00 plus renewal fee; after the first year” in the fee provision concerning the restoration of an expired certificate of a registered apprentice, registered

barber or barbershop permit, and added the fee provision concerning the issuance of a registered or apprentice certificate by certification. The amendment also increased all of the fees except those concerning the issuance of any duplicate copy of a license, certificate or permit, a barber school permit, or the inspection of a newly established barber school.

Chapter 87.

Contractors.

Article 1.

General Contractors.

Sec.

- 87-1. "General contractor" defined; exceptions.
 87-10. Application for license; examination; certificate; renewal.
 87-14. Regulations as to issue of building permits.

Article 2.

Plumbing and Heating Contractors.

Sec.

- 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.
 87-22. License fee based on population; expiration and renewal; penalty.

ARTICLE 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars (\$30,000) or more, shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments.

This section shall not apply to any person or firm or corporation who constructs a building on land owned by that person, firm or corporation when such building is intended for use by that person, firm or corporation after completion. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810; 1971, c. 246, s. 1; 1975, c. 279, s. 1; 1981, c. 783, s. 1.)

Local Modification. — New Hanover: 1983, c. 365.

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, substituted "any person or firm or corporation" for "a 'general contractor' is defined as one" near the beginning of the first paragraph, inserted the language beginning "or who undertakes" and ending "the construction of" near the middle of the first paragraph, deleted "and anyone who shall bid upon or engage in constructing any undertakings or improvements above men-

tioned in the State of North Carolina costing thirty thousand dollars (\$30,000) or more" following "thirty thousand dollars (\$30,000) or more" near the end of the first paragraph, substituted "to be a 'general contractor'" for "and held to have" near the end of the first paragraph, and added the third paragraph.

Session Laws 1981, c. 783, s. 3 contains a severability clause.

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

CASE NOTES

The purpose of, etc. —

In accord with original. See *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980); *Barrett, Robert & Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

The Applicability of this Article, etc. —

In accord with 2nd paragraph in original. See *Phillips v. Parton*, 59 N.C. App. 179, 296 S.E.2d 317 (1982), *aff'd*, — N.C. —, 300 S.E.2d 387 (1983).

Cost of Undertaking, etc. —

In accord with original. See *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The cost of a building, which is usually the contract price, as opposed to the total completed cost, determines whether the \$30,000 limit of this section has been violated and thus whether the contractor must be licensed. *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The principal characteristic of a general contractor, as opposed to a subcontractor or mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

The general contractor may be distinguished from a subcontractor or employee by the degree of control that he or she exercises over the entire project. *Phillips v. Parton*, 59 N.C. App. 179, 296 S.E.2d 317 (1982), *aff'd*, — N.C. —, 300 S.E.2d 387 (1983).

Must Be Licensed at Time of Contracting and During Construction. — This Article clearly contemplates that a contractor should be licensed at the time of contracting and during the construction period. *Barrett, Robert & Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Building for Another on Builder's Land. —

In an action seeking specific performance or money damages under a building contract, the trial court's conclusions that the defendants were unlicensed general contractors who had contracted to construct a dwelling for plaintiffs for a price in excess of \$30,000 supported its judgment that defendants were barred from affirmatively asserting their claims under the contract, and there was no merit to defendants' contention that they should not be so barred because they contracted to build the dwelling on their own property, since a builder, who is unable or unwilling to obtain a general contractor's license from the State of North Carolina, should not be allowed to thwart the

plain intent of this section by the artifice of contracting to build a residence for another on the builder's land. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

No Recovery under Contract or Otherwise Where Licensing Requirements Violated. — One who violates the licensing requirements for general contractors may not recover on the contract nor may he recover under theories of quantum meruit or unjust enrichment. This policy, although a stringent one, has been considered imperative in light of the statutory purpose of this section to protect the public by deterring unlicensed persons from engaging in the construction business. *Brady v. Fulghum*, — N.C. App. —, 302 S.E.2d 4 (1983).

Unlicensed Person May Not Recover, etc. —

In accord with 2nd paragraph in original. See *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on quantum meruit or unjust enrichment. To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

An unlicensed person who, in disregard of this section, contracts with another to construct a building for the cost of \$30,000 or more, may not affirmatively enforce the contract or recover for his services and materials supplied under the theory of quantum meruit or unjust enrichment. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

An unlicensed contractor within the meaning of this section may not maintain a counterclaim arising out of a construction contract in the owner's action against the contractor and his wife to recover the balance due on a promissory note which does not relate to the construction contract between the owners and the contractor. To allow an unlicensed contractor to maintain such a counterclaim would violate the public policy manifest in this section. *Brock v. Day*, — N.C. App. —, 298 S.E.2d 745 (1983).

But May Assert Claim, etc. —

The unlicensed general contractor may enforce his contract defensively, as a set-off, to claims asserted against him. *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Applied in *R.B. Brunemann & Sons v. Duke Univ.*, 533 F. Supp. 365 (M.D.N.C. 1982); *Key v. Floyd*, 55 N.C. App. 467, 285 S.E.2d 864 (1982).

§ 87-2. Licensing Board; organization.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-6. Meetings; notice; quorum.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-10. Application for license; examination; certificate; renewal.

Anyone seeking to be licensed as a general contractor in this State shall file an application for an examination on a form provided by the Board, at least 30 days before any regular or special meeting of the Board accompanied by an examination fee of twenty-five dollars (\$25.00) and by the sum of one hundred dollars (\$100.00) if the application is for an unlimited license, the sum of seventy-five dollars (\$75.00) if the application is for an intermediate license or the sum of fifty dollars (\$50.00) if the application is for a limited license; the fees and sum accompanying any application shall be nonrefundable. The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to five hundred thousand dollars (\$500,000); the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to one hundred seventy-five thousand dollars (\$175,000); and the license certificate shall be classified in accordance with this section. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of Chapter 150A of the General Statutes.

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs,

construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as the common use of the terms are known — that is,

- (1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types;
- (1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the North Carolina Uniform Residential Building Code (Vol. 1-B);
- (2) Highway contractor;
- (3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:
 - a. Water and sewer mains and water service lines and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations;
 - b. Water and wastewater treatment facilities and appurtenances thereto;
 - c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer;
 - d. Public communication distribution facilities; and
 - e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies, and
- (4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

Public utilities contractors constructing water service lines and house and building sewer lines as provided in (3)a above shall terminate said lines at a valve, box, meter, or manhole or cleanout at which the facilities from the building may be connected.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of 30 days thereafter, and then be canceled, but the applicant shall then be entitled to a reexamination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this Article.

Anyone failing to pass this examination may be reexamined at any regular meeting of the Board upon payment of an examination fee of twenty-five dollars (\$25.00). Anyone requesting to take the examination a third or subsequent time shall submit a new application with the appropriate examination and license fees. Certificate of license shall expire on the thirty-first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board of seventy-five dollars (\$75.00) for unlimited license, fifty dollars (\$50.00) for intermediate license and twenty-five dollars (\$25.00) for limited license. Renewal applications received by the Board after January shall be accompanied by a late payment of ten dollars (\$10.00) for each month or part after January. After a lapse of two years no renewal shall be effected and the applicant shall fulfill all requirements of a new applicant as set forth in this section. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2; 1981, c. 739, ss. 1, 2.)

Effect of Amendments. —

The 1981 amendment, substituted the first two sentences of the first paragraph for a former first sentence pertaining to the same subject matter, substituted "upon payment of an examination fee of twenty-five dollars

(\$25.00)" for "without additional fee" at the end of the first sentence of the fifth paragraph, added the second sentence in the fifth paragraph, raised the fees set out in the fifth paragraph, and added the last two sentences in the fifth paragraph.

CASE NOTES

Substantial Compliance. —

Unless a general contractor has substantially complied with the licensing requirements of this section, it may not recover against the owner either under its contract or in quantum meruit. *Barrett, Robert & Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Unlicensed Party, etc. —

An unlicensed general contractor may neither affirmatively enforce his contract nor recover in quantum meruit. *Phillips v. Parton*, 59 N.C. App. 179, 296 S.E.2d 317 (1982), *aff'd*, — N.C. —, 300 S.E.2d 387 (1983).

One who violates the licensing requirements for general contractors may not recover on the contract nor may he recover under theories of quantum meruit or unjust enrichment. This policy, although a stringent one, has been considered imperative in light of the statutory purpose of § 87-1 to protect the public by deterring unlicensed persons from engaging in the construction business. *Brady v. Fulghum*, — N.C. App. —, 302 S.E.2d 4 (1983).

Lapse of License Held Not to Bar Recov-

ery. — Where the contractor was licensed at the significant moment of contracting; the contractor's license lapsed through inadvertence, not as a result of incompetence or disciplinary action by the licensing board; the contractor's license was renewed immediately upon its filing of a renewal application and fees; and the contractor's financial condition and composition remained unchanged during the period the contractor was not licensed, although the contractor was not licensed for 90 percent of the construction period, the factors listed above, particularly the reason for the license lapse and the automatic renewal thereof, confirming the contractor's continued competence and responsibility, indicate that the protective purpose of the licensing statute has been satisfied such that the contractor should not be barred from recovering under its contract with owner. *Barrett, Robert & Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Applied in *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Quoted in *Revis Sand & Stone, Inc. v. King*, 49 N.C. App. 168, 270 S.E.2d 580 (1980).

§ 87-14. Regulations as to issue of building permits.

Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or county in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be thirty thousand dollars (\$30,000) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he or another person contracting to superintend or manage the construction is duly licensed under the terms of this Article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this Article or is duly licensed under this Article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars (\$50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934; 1953, c. 809; 1969, c. 1063, s. 6; 1971, c. 246, s. 4; 1981, c. 783, s. 2.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, inserted "or another person contracting to superintend or manage the construction" near the middle of the section.

Session Laws 1981, c. 783, s. 3 contains a severability clause.

ARTICLE 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.

(a) Definitions. — For the purpose of this Article:

- (1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.
- (2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts, and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.
- (3) The phrase "heating, group number two" means an air conditioning system which consists of an assemblage of interacting components producing conditioned air for comfort cooling by the lowering of temperature, and having a mechanical refrigeration capacity in excess of fifteen tons, and which circulates air.
- (4) The phrase "heating, group number three" shall be deemed and held to be a direct heating system of a building which produces heat to raise the temperature of the space within the building for the purpose of comfort in which electric heating elements or products of combustion exchange heat either directly with the building supply air or indirectly through a heat exchanger and using an air distribution system of ducts. A heating system requiring air distribution ducts and supplied by ground water or utilizing a coil supplied by water from a domestic hot water heater not exceeding 150° Fahrenheit requires either plumbing or heating group number one license to extend piping from valved connections in the domestic hot water system to the heating coil and requires either heating group number one or heating group number three license for installation of coil, duct work, controls, drains and related appurtenances.
- (5) Any person, firm or corporation, who for a valuable consideration, installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or any combination thereof, as defined in this Article, shall be deemed and held to be engaged in the business of plumbing or heating contracting. Any person who installs a plumbing or heating system on property which at the time of installation was intended for sale or to be used primarily for rental is deemed to be engaged in the business of plumbing or heating contracting without regard to receipt of consideration, unless exempted elsewhere in this Article.
- (6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing or heating contracting.
- (7) The word "heating" shall be deemed and held to mean heating group number one, heating group number two, heating group number three, or any combination thereof.
- (8) The obtaining of a license, as required by this Article, shall not of itself authorize the practice of another profession or trade for which a State qualification license is required.
- (9) The word "Board" means the State Board of Examiners of Plumbing and Heating Contractors.

(g) The Board may, in its discretion, grant to plumbing or heating contractors licensed by other states license of the same or equivalent classification without written examination upon receipt of satisfactory proof that the

qualifications of such applicants are substantially equivalent to the qualifications of holders of similar licenses in North Carolina and upon payment of the usual license fee. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2; 1967, c. 770, ss. 1-6; 1971, c. 768, ss. 2-4; 1973, c. 1204; 1979, c. 834, ss. 4-7; 1981, c. 332, s. 1; 1983, c. 569, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment added subsection (g).

The 1983 amendment, effective June 20, 1983, added the second sentences of subdivisions (a)(4) and (a)(5).

§ 87-22. License fee based on population; expiration and renewal; penalty.

All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of 10,000 inhabitants or more shall pay an annual license fee not exceeding fifty dollars (\$50.00), and in cities or towns of less than 10,000 inhabitants an annual license fee not exceeding twenty-five dollars (\$25.00). In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the Board shall increase said license fee ten per centum (10%) for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided further that the Board requires reexamination upon failure of a licensee to renew license within three years after expiration. The Board may adopt regulations requiring attendance at programs of continuing education as a condition of license renewal. (1931, c. 52, s. 7; 1939, c. 224, s. 4; 1971, c. 768, s. 5; 1979, c. 834, s. 8; 1981, c. 332, s. 2.)

Effect of Amendments. —

The 1981 amendment substituted "not exceeding" for "of" preceding "fifty dollars

(\$50.00)" in the first sentence and made the same substitution preceding "twenty-five dollars (\$25.00)" at the end of the first sentence.

§ 87-27.1. Public awareness program.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 88.

Cosmetic Art.

Sec.

- 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.
- 88-4. Beauty parlor, etc.
- 88-6. Operator.
- 88-7. [Repealed.]
- 88-7.1. Practice outside a beauty parlor.
- 88-9. Apprentice.
- 88-10. Qualifications for registered apprentice.
- 88-12. Qualifications for registered cosmetologist.
- 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.
- 88-14. Office in Raleigh; seal; officers and secretary.

Sec.

- 88-15. Compensation and expenses of Board members; inspectors; reports; budget.
- 88-19. Applicants licensed in other states.
- 88-21. (Effective until October 1, 1984) Fees required.
- 88-21. (Effective October 1, 1984) Fees required.
- 88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.
- 88-26. Causes for revocation of certificates.
- 88-28. Acts made misdemeanors.
- 88-28.1. Restraining orders against persons engaging in illegal practices.
- 88-30. Registered manicurist.

Repeal of Chapter. —

Session Laws 1981, c. 615, s. 20 amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Chapter. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1, the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Durham, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Randolph, Richmond, Sampson, Scotland.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cos-

metic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars (\$25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars (\$3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment added the language beginning "and, except as provided" at the end of the first paragraph, and added "from one location to another

or from one owner to another at the same location" at the end of the second sentence of the fifth paragraph.

§ 88-4. Beauty parlor, etc.

"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced, and a "beauty school," "beauty college," or "beauty academy" is any building or part thereof wherein cosmetic art is taught. (1933, c. 179, s. 4; 1981, c. 615, s. 3.)

Effect of Amendments. — The 1981 amendment added the language beginning "and a 'Beauty School'" at the end of the section.

§ 88-6. Operator.

"Operator" is any person who is not a manager or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6; 1981, c. 615, s. 4.)

Effect of Amendments. — The 1981 amendment deleted a comma and "itinerant," following "manager."

§ 88-7: Repealed by Session Laws 1981, c. 615, s. 5.

§ 88-7.1. Practice outside a beauty parlor.

A registered cosmetologist shall be allowed to attend to the cosmetic needs of persons who are sick or disabled and confined to their place of residence. Registered cosmetologists shall also be allowed to attend to the cosmetic needs of persons in hospitals, nursing homes, rest homes, retirement homes, rehabilitation facilities, mental institutions, correctional facilities, funeral establishments, and similar institutions or facilities. (1981, c. 615, s. 6.)

§ 88-9. Apprentice.

"Apprentice" is any person who is not a manager or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9; 1981, c. 615, s. 7.)

Effect of Amendments. — The 1981 amendment deleted a comma and "itinerant cosmetologist," following "manager."

§ 88-10. Qualifications for registered apprentice.

No person shall be issued a certificate of registration as a registered apprentice by the State Board of Cosmetic Art Examiners unless:

- (1) The applicant has completed at least 1,200 hours in classes in a cosmetic art school or college approved by the Board and
- (2) The applicant passes a written and practical examination prescribed by the Board; applicants shall not be allowed to take an oral examination in lieu of the written portion of the examination administered by the Board.

In the alternative, applicants may be admitted under the procedures of G.S. 88-19.

Applicants shall pay the fees required by G.S. 88-21. (1933, c. 179, s. 10; 1941, c. 234, s. 1; 1953, c. 1304, ss. 1, 2; 1963, c. 1257, s. 2; 1973, c. 450, s. 1; 1981, c. 615, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 88-12. Qualifications for registered cosmetologist.

A certificate of registration as a registered cosmetologist shall be issued by the State Board of Cosmetic Art Examiners to any person who is qualified under this Chapter or who meets the following qualifications:

- (1) Successful completion of at least 1,200 hours in classes in a cosmetic art school, college or other institution of learning approved by the Board and
 - a. Completion of an apprenticeship for a period of at least six months under direct supervision of a registered managing cosmetologist as certified by sworn affidavit of three registered cosmetologists or by other evidence satisfactory to the Board, or
 - b. Completion of an additional 300 hours of cosmetic art education in a cosmetic art school, public school, community college, technical institute, college or university approved by the Board;

- (2) Successful completion of an examination conducted by the Board to determine the applicant's fitness and skill to practice cosmetic art and whether he or she has sufficient knowledge of the diseases of the face, skin, and scalp to avoid the aggravation and spreading thereof in the practice of the profession; provided that applicants shall not be allowed to take an oral examination in lieu of the written portion of the examination administered by the Board; and
- (3) Payment of the fees required by G.S. 88-21. (1933, c. 179, s. 12; 1953, c. 1304, s. 3; 1973, c. 450, s. 2; 1977, c. 899, s. 1; 1981, c. 615, s. 9.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.

(a) The State Board of Cosmetic Art Examiners is established to consist of four members appointed by the Governor. Three members shall be experienced, licensed cosmetologists who have practiced all branches of cosmetic art in this State for at least five years immediately preceding appointment to the Board. These members shall be free of any connection with any cosmetic art school, college, academy, or training school during their service on the Board. The other member shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) Cosmetologist members of the Board shall serve staggered three-year terms. In order to establish a staggered term system, the terms of those members currently serving on the Board shall expire as follows: the term of the member having served the longest time on the Board shall expire on June 30, 1981; the term of the member having served the least amount of time on the Board shall expire on June 30, 1983; and the term of the remaining cosmetologist member shall expire on June 30, 1982. Thereafter, all cosmetologist members shall serve three-year terms.

The Governor shall appoint the public member not later than July 1, 1981, to serve a three-year term.

No Board member appointed on or after July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is appointed and qualifies.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2; 1973, c. 1360, s. 1; 1975, c. 857, s. 2; 1981, c. 615, s. 10.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 88-14. Office in Raleigh; seal; officers and secretary.

The Board of Cosmetic Art Examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall operate under its present structure and composure until July 1, 1977, and thereafter said Board shall elect its own officers and in addition thereto shall employ an executive secretary, who shall not be a member of the Board. The salary of such executive secretary shall be fixed by the State Personnel Department. The secretary shall keep and preserve all the records of the Board, issue all necessary notices

and perform such other duties, clerical and otherwise, as may be imposed upon such secretary by said Board of Cosmetic Art Examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said Board the fees prescribed by this Chapter and shall turn over to the State Treasurer all funds collected or received under this Chapter, which fund shall be credited to the Board of Cosmetic Art Examiners, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Chapter. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. Nothing in this Chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer, derived from fees and fines collected under the provisions of this Chapter and received by the State Treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1; 1957, c. 1184, s. 1; 1969, c. 844, s. 4; 1971, c. 355, s. 1; c. 616, ss. 1, 2; 1975, c. 857, s. 3; 1981, c. 884, s. 7.)

Effect of Amendments. — The 1981 amendment deleted the former sixth sentence, relating to the bond of the secretary.

Editor's Note. — Section 128-8, referred to in this section, was repealed by Session Laws 1981, c. 884, s. 13, effective July 8, 1981.

§ 88-15. Compensation and expenses of Board members; inspectors; reports; budget.

Each member of the Board of Cosmetic Art Examiners shall receive compensation for his services and expenses as provided in G.S. 93B-5 but shall be limited to payment for services deemed to be official business of the Board. Official business of the Board shall include meetings called by the chairman, supervision or administering of examinations, or investigations or inspections made subject to the regulations cited in the following paragraph. No Board member shall be authorized to attend trade shows or to travel out of the State and no per diem or travel expenses shall be paid for such travel unless said Board member is an officer of the organization holding such meeting.

Said Board, with the approval of the Director of the Budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the State Personnel Department. The inspectors or agents so appointed shall perform such duties as may be prescribed by the Board. Any inspector appointed under authority of this section or any member of the Board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this Chapter. No member of the Board shall exercise this authority on a routine basis but shall do so at the direction of either the Board, the chairman, the executive secretary or the inspector assigned to the territory, such direction to be governed by a complaint or problem registered with the Board of Cosmetic Art office or when an inspector deems it necessary to call in a Board member. Reimbursement for per diem and travel is subject to these provisions. Prior to reimbursement, the requesting Board member must submit a detailed written report to the Board of Cosmetic Art office for the official file. The inspectors and agents appointed under authority of this Chapter shall make such reports to the Board of Cosmetic Art Examiners as said Board may require. The said Board shall, on or before June 1 of each year, submit a budget to the Director of the Budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for the ensuing fiscal year including the estimated compensation and expenses of

Board members. The said budget shall be subject to the approval of the Director of the Budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the Board of Cosmetic Art Examiners, and approved by the Director of the Budget of the State of North Carolina; that all salaries and expenses in connection with the administration of this Chapter shall be paid upon a warrant drawn on the State Treasurer.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this Chapter.

The State Board shall report annually to the Governor a full statement of receipts and disbursements and also a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2; 1971, c. 355, ss. 2, 3; c. 616, ss. 1, 3; 1973, c. 1360, s. 2; 1975, c. 857, s. 4; 1981, c. 615, s. 11; 1983, c. 913, s. 9.)

Effect of Amendments. — The 1981 amendment, in the second sentence of the first paragraph, deleted "deemed to be official business of the Board" preceding "shall include meetings."

The 1983 amendment, effective July 22, 1983, deleted "said warrants to be drawn by the secretary of the Board and approved by the State Auditor" at the end of the last sentence of

the second paragraph and deleted the former first sentence of the fourth paragraph, which provided for an annual audit and examination of the receipts and disbursements of the State Board of Cosmetic Art Examiners by the State Auditor. The act also amended the section catchline.

§ 88-19. Applicants licensed in other states.

The board shall issue a license to applicants already licensed as an apprentice or registered cosmetologist in another state provided the applicant presents evidence satisfactory to the board that:

- (1) He is currently an active, competent practitioner in good standing; and
- (2) He has practiced at least one out of the three years immediately preceding his application; and
- (3) He currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 88-10 or G.S. 88-12.

In lieu of meeting the requirements of subdivisions (1)–(5) of this section, any applicant who has been licensed to practice as an apprentice or registered cosmetologist by the examining board of another state shall be admitted to practice cosmetic art in this State under the same reciprocity or comity provisions which the state of his or her registration or licensing grants to persons licensed in this State. (1933, c. 179, s. 19; 1953, c. 1304, s. 4; 1957, c. 1184, s. 3; 1963, c. 1257, s. 3; 1973, c. 256, s. 1; 1981, c. 615, s. 12; c. 967; 1983, c. 438.)

Effect of Amendments. — The first 1981 amendment rewrote this section.

The second 1981 amendment added the last paragraph.

The 1983 amendment, effective June 6, 1983, deleted "provided the applicant files his application on or before June 30, 1982" at the end of the third paragraph.

§ 88-21. (Effective until October 1, 1984) Fees required.

The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be five dollars (\$5.00). The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be ten dollars (\$10.00). The regular or annual license fee of a registered cosmetologist shall be eight dollars (\$8.00), and the renewal of the license of a registered cosmetologist shall be eight dollars (\$8.00) if renewed before the same becomes delinquent, and if renewed after the same becomes delinquent there shall be charged a penalty of three dollars (\$3.00) in addition to the regular license fee of eight dollars (\$8.00); the annual license fee of a registered apprentice shall be four dollars (\$4.00), and all licenses, both for apprentices and for registered cosmetologists, shall be renewed as of the first day of October each and every year. All cosmetic art shops in operation shall pay an annual fee of three dollars (\$3.00) for each active booth on or before February 1, if paid before it becomes delinquent, and if renewed after the same becomes delinquent, there shall be charged a penalty of ten dollars (\$10.00) in addition to the regular permit fee. The fee for registration of an expired permit of a cosmetic art shop shall be twenty-five dollars (\$25.00). All cosmetic art schools shall pay a fee of fifty dollars (\$50.00) annually. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars (\$5.00) and registration of an expired certificate of an apprentice shall be three dollars (\$3.00). Applicants for licensure under G.S. 88-19 shall pay an application fee of fifteen dollars (\$15.00) and a license fee of five dollars (\$5.00) for an apprentice or eight dollars (\$8.00) for registration as a cosmetologist; thereafter, the annual fee for renewal of licenses issued pursuant to G.S. 88-19 shall be the same as that charged registered apprentices and cosmetologists under this section. (1933, c. 179, s. 21; 1955, c. 1265; 1973, c. 256, s. 2; 1975, c. 857, s. 6; 1981, c. 615, s. 13.)

Section Set Out Twice. — The section above is effective until Oct. 1, 1984. For this section as amended effective Oct. 1, 1984, see the

following section, also numbered 88-21.

Effect of Amendments. — The 1981 amendment added the last sentence.

§ 88-21. (Effective October 1, 1984) Fees required.

The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be five dollars (\$5.00). The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be ten dollars (\$10.00). The regular or annual license fee of a registered cosmetologist shall be eleven dollars (\$11.00), and the renewal of the license of a registered cosmetologist shall be eleven dollars (\$11.00) if renewed before the same becomes delinquent, and if renewed after the same becomes delinquent there shall be charged a penalty of three dollars (\$3.00) in addition to the regular license fee of eleven dollars (\$11.00); the annual license fee of a registered apprentice shall be five dollars (\$5.00), and all licenses, both for apprentices and for registered cosmetologists, shall be renewed as of the first day of October each and every year. All cosmetic art shops in operation shall pay an annual fee of three dollars (\$3.00) for each active booth on or before February 1, if paid before it becomes delinquent, and if renewed after the same becomes delinquent, there shall be charged a penalty of ten dollars (\$10.00) in addition to the regular permit fee. The fee for registration of an expired permit of a cosmetic

art shop shall be twenty-five dollars (\$25.00). All cosmetic art schools shall pay a fee of fifty dollars (\$50.00) annually. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars (\$5.00) and registration of an expired certificate of an apprentice shall be three dollars (\$3.00). Applicants for licensure under G.S. 88-19 shall pay an application fee of fifteen dollars (\$15.00) and a license fee of five dollars (\$5.00) for an apprentice or eleven dollars (\$11.00) for registration as a cosmetologist; thereafter, the annual fee for renewal of licenses issued pursuant to G.S. 88-19 shall be the same as that charged registered apprentices and cosmetologists under this section. All cosmetic art teachers shall be licensed by the Board and shall pay a fee of ten dollars (\$10.00) for the license, which shall be renewed every two years. (1933, c. 179, s. 21; 1955, c. 1265; 1973, c. 256, s. 2; 1975, c. 857, s. 6; 1981, c. 615, s. 13; 1983, c. 523.)

Section Set Out Twice. — The section above is effective Oct. 1, 1984. For this section as in effect until Oct. 1, 1984, see the preceding section, also numbered 88-21.

Effect of Amendments. — The 1983 amend-

ment, effective Oct. 1, 1984, substituted "eleven dollars (\$11.00)" for "eight dollars (\$8.00)" and "five dollars (\$5.00)" for "four dollars (\$4.00)" throughout the section and added the last sentence.

§ 88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.

- (a) (1) The State Board of Cosmetic Art Examiners shall have the authority to make a reasonable curriculum and rules for recognized schools and colleges of beauty culture and make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such curriculum and rules and the sanitary rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the curriculum and rules and the sanitary rules and regulations shall be furnished from the office of the Board or by the above mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school, and a copy of the curriculum and rules for recognized schools and colleges of beauty culture shall be kept posted in a conspicuous place in each school and the rules and regulations complied with as required by this Chapter.
- (2) The Board shall adopt regulations prohibiting the use of commercial chemicals of unknown content by persons registered under this Chapter. For purposes of this section, "commercial chemicals" are those products sold only through beauty and barber supply houses and not available to the general public.
- (3) The Board shall adopt regulations instructing persons registered under this Chapter in the proper use and application of commercial chemicals where no manufacturer's instructions are included. In the alternative, the Board shall prohibit the use of such commercial chemicals by persons registered under this Chapter.

(b) The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9; 1981, c. 614, s. 1; c. 615, s. 14.)

Effect of Amendments. — The first 1981 amendment, ratified June 18, 1981, and effective July 1, 1981, reenacted the former first sentence of the section without change, and deleted a requirement that the rules be approved by the Commission for Health Services in the third sentence of the first paragraph as it stood before the second 1981 amendment. The section as so amended read as follows: "The State Board of Cosmetic Art Examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said Board shall be furnished from the office of the Board or by the above-mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school.

The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to Board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board of Cosmetic Art shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term."

The second 1981 amendment, ratified June 19, 1981, and effective on ratification, designated the former first paragraph as the present subdivision (a)(1), inserted "the" preceding "authority" near the beginning of the first sentence of subdivision (a)(1), inserted "a reasonable curriculum and rules for recognized schools and colleges of beauty culture and make" near the beginning of that sentence, inserted "curriculum and rules and the sanitary" near the end of that sentence, inserted "curriculum and rules and the sanitary" near the beginning of the third sentence of subdivision (a)(1), deleted "adopted by said Board and approved by the Commission for Health Services" preceding "shall be furnished" near the beginning of that sentence, and added the language beginning "and a copy of the curriculum" at the end of subdivision (a)(1). The amendment added subdivisions (a)(2) and (a)(3), designated the former second and third paragraphs as subsection (b), and deleted "of Cosmetic Art" following "to the Board" near the beginning of the second paragraph of subsection (b).

§ 88-26. Causes for revocation of certificates.

The Board of Cosmetic Art Examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(6) The conviction of any of the offenses described in G.S. 88-28, subdivisions (3), (4), (6) and (7).

(1933, c. 179, s. 26; 1941, c. 234, s. 4; 1981, c. 615, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "conviction" for "commission" in subdivision (6).

§ 88-28. Acts made misdemeanors.

Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than twenty-five dollars (\$25.00) and not more than one hundred dollars (\$100.00), or up to 30 days in jail, or both:

- (4) Obtaining, or attempting to obtain, a certificate of registration for money other than the required fee or any other thing of value, or by fraudulent misrepresentations.
- (7) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners. (1933, c. 179, s. 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; 1975, c. 857, s. 8; 1981, c. 614, s. 2; c. 615, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, deleted

"and approved by the Commission for Health Services" at the end of subdivision (7).

The second 1981 amendment, in subdivision (4), inserted "the" preceding "required fee" and deleted a comma following "required fee."

§ 88-28.1. Restraining orders against persons engaging in illegal practices.

If it is found that any licensed cosmetologist, cosmetic art shop, or other person subject to the provisions of this Chapter is violating any rules and regulations adopted by the State Board of Cosmetic Art Examiners or any provisions of G.S. 88-28, then the Department of Human Resources, any county or district health director, or the State Board of Cosmetic Art Examiners shall give notice to the person of the violation and apply to the superior court for injunctive relief to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of Chapter 88, section 28, of the General Statutes of North Carolina [G.S. 88-28], the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of Article 37 of Chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this Chapter. Actions under this section shall be commenced in the county in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1949, c. 505, s. 1; 1973, c. 476, s. 128; 1975, c. 857, s. 10; 1981, c. 614, s. 3; c. 615, s. 18.)

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, deleted "The Department of Human Resources and/or any county, city or district health officer and/or the State Board of Cosmetic Art Examiners" at the beginning of the first sentence of the section, and in that first sentence, substituted "is" for "shall be" preceding "found that any," deleted "who is" preceding "subject to the," deleted "of the" following "violating any," deleted "as approved by the Commission for Health Services" preceding "or any provisions,"

substituted "G.S. 88-28" for "Chapter 88, section 28, of the General Statutes of North Carolina," substituted the language beginning "then the Department" and ending "for injunctive relief" for "may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order," and made minor changes in punctuation.

The second 1981 amendment added the last sentence.

§ 88-30. Registered manicurist.

A person may be licensed to engage in the practice of manicuring or pedicuring in a cosmetic art shop, beauty parlor or hairdressing establishment without being a registered cosmetologist. A certificate of registration as a registered manicurist shall be issued by the Board of Cosmetic Art Examiners to any person who meets the following qualifications:

- (2) Repealed by Session Laws 1981, c. 615, s. 19.
(1963, c. 1257, s. 4; 1973, c. 450, s. 4; 1981, c. 615, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment deleted subdivision (2), which read "Who is at least 17 years of age."

Chapter 89A.
Landscape Architects.

Repeal of Chapter. — Session Laws 1979, c. 872, s. 7, which provided that this Chapter would be repealed effective July 1, 1981, was repealed by Session Laws 1981, c. 427.

§ 89A-3. North Carolina Board of Landscape Architects; appointments; powers.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 89B.

Foresters.

Sec.

89B-3. State Board of Registration for Foresters; appointment of members; terms.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

Repeal of Chapter. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Chapter effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 89B-3. State Board of Registration for Foresters; appointment of members; terms.

(a) A State Board of Registration for Foresters is created to administer the provisions of this Chapter. The Board shall have five members as follows:

(1) Four duly practicing registered foresters, at least three of whom hold at a minimum a bachelor's degree from an accredited forestry school, and

(2) One public member.

Each member shall be appointed by the Governor for a three-year term. No member may serve more than two complete consecutive terms.

(1975, c. 531, s. 3; 1983, c. 103, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 103, s. 2, provides: "Notwithstanding Section 1 of this act, all members currently serving on the

Board may continue in office until the expiration of their current terms."

Effect of Amendments. — The 1983 amendment, effective March 25, 1983, rewrote subsection (a).

Chapter 89C.

Engineering and Land Surveying.

Sec.

89C-14. Application for registration; registration fees.

Sec.

89C-22. Disciplinary action — charges; procedure.

§ 89C-1. Short title.

Local Modification. — New Hanover: 1983, c. 365.

§ 89C-3. Definitions.

CASE NOTES

Stated in In re Trulove, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 89C-4. State Board of Registration; appointment; terms.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 89C-14. Application for registration; registration fees.

(b) The registration fee shall be established by the Board in an amount not to exceed one hundred dollars (\$100.00) which shall accompany the applications. The fee for comity registration of engineers and land surveyors who hold unexpired certificates in another state or a territory of the United States or in Canada shall be the total current fee as fixed by the Board.

(e) A candidate failing an examination may apply, and be considered by the Board, for reexamination at the end of six months. The Board shall make such reexamination charge as is necessary to defray the cost of the examination.

A candidate failing an examination three times will not be permitted to take a reexamination until he has made a written appeal to the Board and his tentative qualifications for the examination are reviewed and reaffirmed by the Board. (1921, c. 1, s. 9; C.S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1; 1981, c. 230; 1983, c. 183, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "thirty dollars (\$30.00)" for "twenty dollars (\$20.00)" at the end of the first paragraph of subsection (e).

The 1983 amendment, effective July 1, 1983, substituted "an amount not to exceed one hun-

dred dollars (\$100.00)" for "amounts not to exceed seventy dollars (\$70.00) for an engineer or seventy dollars (\$70.00) for registration as a land surveyor" in the first sentence of subsection (b) and deleted "provided the charge of any reexamination shall not exceed thirty dollars (\$30.00)" at the end of the first paragraph of subsection (e).

§ 89C-16. Certificates of registration; effect; seals.

CASE NOTES

Quoted in *In re Trulove*, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 89C-22. Disciplinary action — charges; procedure.

(b) All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board or hearing officer as provided under the requirements of Chapter 150A of the General Statutes.

(1921, c. 1, s. 10; C.S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1; 1981, c. 789.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "or hearing officer as provided

under the requirements of Chapter 150A of the General Statutes" for "within three months after the date on which they shall have been referred" at the end of subsection (b).

CASE NOTES

Cited in *In re Trulove*, 54 N.C. App. 218, 282 S.E.2d 544 (1981).

§ 89C-25.2. Program of licensure by discipline.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Chapter 89D.

Landscape Contractors.

Sec.

89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.

Sec.

89D-5. Application for certificate; examination; renewal.

Cross References. — As to review and evaluation of the programs and functions authorized under this Chapter, see § 143-34.26.

§ 89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.

(a) There is created the North Carolina Landscape Contractors' Registration Board (hereinafter called the Board) which shall issue registration certificates of title to landscape contractors. The Board shall be composed of nine members appointed as follows: Two by the Governor to represent the public at large; two by the Commissioner of Agriculture; two practicing nurserymen operating a nursery certified by the North Carolina Department of Agriculture Plant Pest Inspection Program appointed by the Board of Directors of the North Carolina Association of Nurserymen, Inc.; two registered landscape contractors in the business of landscape contracting appointed by the Board of Directors of the North Carolina Landscape Contractors' Association, Inc.; and one registered landscape architect appointed by the Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects. All appointments shall be for three-year terms and no member shall serve more than two complete consecutive terms.

Any vacancy on the Board created by death, resignation or otherwise shall be filled for the unexpired term by the initial appointing authority and all members shall serve until their successors are appointed and qualify.

(1975, c. 741, s. 4; 1983, c. 108, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 108, s. 4, provides: "Schedule. All members of the Board serving on the effective date of this act shall complete their respective terms. No member appointed on or after the effective date of this act shall serve more than two complete consecutive three-year terms."

In order to stagger the terms of board members, the following initial appointments shall be made:

The Board of Directors of the North Carolina Association of Nurserymen, Inc., shall appoint one member on December 1, 1983, and one on December 1, 1985.

The Board of Directors of the North Carolina Landscape Contractors Association, Inc., shall appoint one member on December 1, 1983, and one member on December 1, 1985.

The Governor shall appoint one member on December 1, 1984, and one member on December 1, 1985.

The Commissioner of Agriculture shall appoint two members on December 1, 1984.

The Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects shall appoint one member on December 1, 1983."

Effect of Amendments. — The 1983 amendment, effective March 28, 1983, rewrote subsection (a).

§ 89D-5. Application for certificate; examination; renewal.

(a) Any person, partnership, association or corporation hereinafter desiring to register and be titled as a landscape contractor shall make written application for a certificate of title to the Board on such forms as are prescribed by the Board. Each applicant for a certificate of title as a landscape contractor shall be at least 18 years of age. Prior to July 1, 1976, each applicant for a certificate shall have been actively engaged as an untitled landscape contractor for at least one year prior to date of application. After July 1, 1976, an applicant shall furnish evidence satisfactory to the Board of three years' experience in landscape contracting or the completion of a study or combination of study and experience in landscape contracting equivalent to three years' experience under a landscape contractor.

(b) Any person who applies to the Board to be registered and titled as a landscape contractor shall be required to take an oral or written examination to determine his qualifications. Each application for registration by examination shall be accompanied by an application fee of fifty dollars (\$50.00).

The Board shall compile a manual from which the examination will be prepared. The examination fee shall not exceed twenty-five dollars (\$25.00). Any one failing to pass an examination may be reexamined upon payment of the same fee as that charged to persons taking the examination for the first time, in accordance with such rules as the Board may adopt pertaining to examinations and reexaminations.

If the results of the examination are satisfactory, the Board shall issue the applicant a certificate authorizing him to be titled as a landscape contractor in the State of North Carolina upon payment of the initial certification fee as outlined in subsection (c).

(1975, c. 741, s. 5; 1983, c. 108, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 108, s. 4, provides: "Schedule. All members of the Board serving on the effective date of this act shall complete their respective terms. No member appointed on or after the effective date of this act shall serve more than two complete consecutive three-year terms."

In order to stagger the terms of board members, the following initial appointments shall be made:

The Board of Directors of the North Carolina Association of Nurserymen, Inc., shall appoint one member on December 1, 1983, and one on December 1, 1985.

The Board of Directors of the North Carolina Landscape Contractors Association, Inc., shall

appoint one member on December 1, 1983, and one member on December 1, 1985.

The Governor shall appoint one member on December 1, 1984, and one member on December 1, 1985.

The Commissioner of Agriculture shall appoint two members on December 1, 1984.

The Board of Directors of the North Carolina Chapter of the American Society of Landscape Architects shall appoint one member on December 1, 1983."

Effect of Amendments. — The 1983 amendment, effective March 28, 1983, deleted the former last sentence of subsection (a), which read "Each application for an initial certificate shall be accompanied by an application fee of twenty dollars (\$20.00)," and rewrote subsection (b).

Chapter 90.

Medicine and Allied Occupations.

Article 1.

Practice of Medicine.

- Sec.
- 90-1. North Carolina Medical Society incorporated.
- 90-2. Board of Examiners.
- 90-3. Medical Society nominates Board.
- 90-4. Board elects officers; quorum.
- 90-5. Meetings of Board.
- 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.
- 90-9. Examination for license; scope; conditions and prerequisites.
- 90-11. Qualifications of applicant for license.
- 90-12. Limited license.
- 90-14. Revocation, suspension, annulment or denial of license.
- 90-14.4. Place of hearings for revocation or suspension of license.
- 90-14.8. Appeal from Board's decision revoking or suspending a license.
- 90-14.12. Injunctions.
- 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.
- 90-15. License fee; salaries, fees, and expenses of Board.
- 90-18. Practicing without license; practicing defined; penalties.
- 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

Article 1A.

Treatment of Minors.

- 90-21.5. Minor's consent sufficient for certain medical health services.

Article 2.

Dentistry.

- 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.
- 90-24. Quorum; adjourned meetings.
- 90-26. Annual and special meetings.
- 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.
- 90-36. Licensing practitioners of other states.
- 90-41. Disciplinary action.

Article 4.

Pharmacy.

Part 1. Practice of Pharmacy.

Sec.

90-53 to 90-75. [Recodified.]

Part 1A. Drug Product Selection.

90-76.1 to 90-76.5. [Recodified.]

90-76.6. [Repealed.]

Part 2. Dealing in Specific Drugs Regulated.

90-77 to 90-80.1. [Repealed.]

90-85.1. [Repealed.]

Article 4A.

North Carolina Pharmacy Practice Act.

- 90-85.2. Legislative findings.
- 90-85.3. Definitions.
- 90-85.4. North Carolina Pharmaceutical Association.
- 90-85.5. Objective of Pharmaceutical Association.
- 90-85.6. Board of Pharmacy; creation; membership; qualification of members.
- 90-85.7. Board of Pharmacy; selection; vacancies; commission; term; removal.
- 90-85.8. Organization.
- 90-85.9. Meetings.
- 90-85.10. Employees; Executive Director.
- 90-85.11. Compensation of employees.
- 90-85.12. Executive Director to make investigations and prosecute.
- 90-85.13. Approval of schools and colleges of pharmacy.
- 90-85.14. Practical experience program.
- 90-85.15. Application and examination for licensure as a pharmacist; prerequisites.
- 90-85.16. Examination.
- 90-85.17. License renewal.
- 90-85.18. Approval of continuing education programs.
- 90-85.19. Reinstatement.
- 90-85.20. Licensure without examination.
- 90-85.21. Pharmacy permit.
- 90-85.22. Devices; registration.
- 90-85.23. License and permit to be displayed.
- 90-85.24. Fees collectible by Board.
- 90-85.25. Disaster reports.
- 90-85.26. Prescription orders preserved.
- 90-85.27. Definitions.
- 90-85.28. Selection by pharmacists permissible; prescriber may permit or

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prohibit selection; price limit on selected drugs.

- 90-85.29. Prescription label.
- 90-85.30. Prescription record.
- 90-85.31. Prescriber and pharmacist liability not extended.
- 90-85.32. Filling and refilling regulations.
- 90-85.33. Unit dose medication systems.
- 90-85.34. Unique pharmacy practice.
- 90-85.35. Availability of patient records.
- 90-85.36. Availability of pharmacy records.
- 90-85.37. Embargo.
- 90-85.38. Disciplinary authority.
- 90-85.39. Injunctive authority.
- 90-85.40. Violations.

Article 5.

North Carolina Controlled Substances Act.

- 90-87. Definitions.
- 90-88. Authority to control.
- 90-89. Schedule I controlled substances.
- 90-90. Schedule II controlled substances.
- 90-91. Schedule III controlled substances.
- 90-92. Schedule IV controlled substances.
- 90-93. Schedule V controlled substances.
- 90-94. Schedule VI controlled substances.
- 90-95. Violations; penalties.
- 90-95.2. Cooperation between law-enforcement agencies.
- 90-96. Conditional discharge and expunction of records for first offense.
- 90-96.01. Drug education schools; responsibilities of the Department of Human Resources; fees.
- 90-100. Rules and regulations.
- 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.
- 90-103. Revocation or suspension of registration.
- 90-104. Records of registrants or practitioners.
- 90-106. Prescriptions and labeling.
- 90-108. Prohibited acts; penalties.
- 90-109. (Effective until July 1, 1984) Nonprofessional treatment.
- 90-109. (Effective July 1, 1984) Licensing required.
- 90-112. Forfeitures.
- 90-113.2. Judicial review.
- 90-113.3. Education and research.
- 90-113.4. [Repealed.]

Article 5A.

North Carolina Toxic Vapors Act.

- 90-113.9. Definitions.
- 90-113.14. Conditional discharge and expunction of records for first offenses.
- 90-113.15 to 90-113.19. [Reserved.]

Article 5B.

Drug Paraphernalia.

Sec.

- 90-113.20. Title.
- 90-113.21. General provisions.
- 90-113.22. Possession of drug paraphernalia.
- 90-113.23. Manufacture or delivery of drug paraphernalia.
- 90-113.24. Advertisement of drug paraphernalia.

Article 6.

Optometry.

- 90-116. Board of Examiners in Optometry.
- 90-117.1. Quorum; adjourned meetings.
- 90-117.3. Annual and special meetings.
- 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.
- 90-118.2. Displaying license and current certificate of renewal.
- 90-118.3. Refusal to grant renewal of license.
- 90-118.5. Licensing practitioners of other states.
- 90-118.8, 90-118.9. [Repealed.]
- 90-118.11. Unauthorized practice; penalty for violation of Article.
- 90-121.1. Board may enjoin illegal practices.
- 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.
- 90-123. Fees.
- 90-123.1. Continuing education courses required.
- 90-127.3. Copy of prescription furnished on request.

Article 7.

Osteopathy.

- 90-130. Board of Examiners; membership; officers; meeting.
- 90-132. When examination dispensed with; temporary permit; annual registration.

Article 8.

Chiropractic.

- 90-139. Creation and membership of Board of Examiners.
- 90-140. Selection of chiropractic members of Board.
- 90-141. Organization; quorum.
- 90-143. Definitions of chiropractic; examinations; educational requirements.
- 90-143.1. Applicants licensed in other states.
- 90-145. Grant of license.
- 90-154. Grounds for professional discipline.

Sec.

90-156. Pay of Board and authorized expenditures.

Article 9.

Nurse Practice Act.

90-158 to 90-171.18. [Recodified.]

Article 9A.

Nursing Practice Act.

90-171.19. Legislative findings.

90-171.20. Definitions.

90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

90-171.22. Officers.

90-171.23. Duties, powers, and meetings.

90-171.24. Executive director.

90-171.25. Custody and use of funds.

90-171.26. The Board may accept contributions, etc.

90-171.27. Expenses payable from fees collected by Board.

90-171.28. Nurses registered under previous law.

90-171.29. Qualifications of applicants for examination.

90-171.30. Licensure by examination.

90-171.31. Reexamination.

90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.

90-171.33. Temporary license.

90-171.34. Licensure renewal.

90-171.35. Reinstatement.

90-171.36. Inactive list.

90-171.37. Revocation, suspension, or denial of licensure.

90-171.38. Standards for nursing programs.

90-171.39. Approval.

90-171.40. Periodic surveys.

90-171.41. Baccalaureate in nursing candidate credits.

90-171.42. Continuing education programs.

90-171.43. License required.

90-171.44. Prohibited acts.

90-171.45. Violation of Article.

90-171.46. Injunctive authority.

90-171.47. Reports: immunity from suit.

Article 10.

Midwives.

90-172. [Repealed.]

Article 10A.

Practice of Midwifery.

90-178.1. Title.

90-178.2. Definitions.

90-178.3. Regulation of midwifery.

90-178.4. Administration.

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90-178.5. Qualifications for approval.

90-178.6. Denial, revocation or suspension of approval.

90-178.7. Enforcement.

Article 11.

Veterinarians.

90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

90-184. Compensation of the Board.

90-185. General powers of the Board.

90-186. Special powers of the Board.

90-187. Application for license; qualifications.

90-187.3. Applicants licensed in other states.

90-187.6. Veterinary assistants.

90-187.8. Discipline of licensees.

80-187.10. Necessity for license; certain practices exempted.

90-187.13. Injunctions.

Article 12A.

Podiatrists.

90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.

90-202.5. Applicants to be examined; examination fee; requirements.

90-202.6. Examinations; subjects; certificates.

90-202.7. Applicants licensed in other states.

90-202.8. Revocation of certificate; grounds for; suspension of certificate.

90-202.13. Injunctions.

Article 13A.

Practice of Funeral Service.

90-210.18. Construction of Article; State Board; members; election; qualifications; term; vacancies.

90-210.25. Licensing.

90-210.28. Fees.

Article 14B.

Disposition of Unclaimed Bodies.

90-216.6 to 90-216.11. [Repealed.]

Article 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

90-216.12. [Repealed.]

Article 15.

Autopsies.

90-127 to 90-220. [Repealed.]

Article 15A.

Uniform Anatomical Gift Act.

90-220.1 to 90-220.11. [Repealed.]

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Dental Hygiene Act.

Sec.

90-221. Definitions.

90-233. Practice of dental hygiene.

Article 17.

Dispensing Opticians.

90-236.1. Requirements for filling contact lens prescriptions.

90-237. Qualifications for dispensing opticians.

90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

90-239. Organization, meetings and powers of Board.

90-240. Examination.

90-241. Waiver of written examination requirements.

90-242. [Repealed.]

90-243. Registration of places of business, apprentices.

90-244. Display, use, and renewal of license of registration.

90-245. Collection of fees.

90-246. Fees.

90-247. [Repealed.]

90-248. Compensation and expenses of Board members and secretary.

90-249. Powers of the Board.

90-252. Engaging in practice without license.

90-253. Exemptions from Article.

90-254. General penalty for violation.

90-255. Rebates.

Article 18A.

Practicing Psychologists.

90-270.4. Exemptions to this Article.

90-270.6. Board of Examiners in Psychology; appointment; term of office; composition.

90-270.11. Licensing and examination.

90-270.19. Injunctive authority.

Article 18B.

Physical Therapy.

90-270.25. Board of Examiners.

Article 18C.

Marital and Family Therapy Certification Act.

90-270.53. Application for certificate without examination before July 1, 1982.

90-270.54. Application for certificate by examination.

Article 20.

Nursing Home Administrator Act.

90-276. Definitions.

Sec.

90-277. Composition of Board.

90-278. Qualifications for licensure.

90-279. Licensing function.

90-280. Fees; display of license; duplicate license; inactive list.

90-281. Collection of funds.

90-282. [Repealed.]

90-283. Organization of Board; compensation; employees and services.

90-285. Functions and duties of the Board.

90-285.1. Suspension, revocation or refusal to issue a license.

90-286. Renewal of license.

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

90-294. License required; Article not applicable to certain activities.

90-301. Grounds for suspension or revocation of license.

90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

90-304. Powers and duties of Board.

Article 23.

Right to Natural Death; Brain Death.

90-320. General purpose of Article.

90-321. Right to a natural death.

90-322. Procedures for natural death in the absence of a declaration.

90-324 to 90-328. [Reserved.]

Article 24.

Registered Practicing Counselors.

90-329. Declaration of policy.

90-330. Definitions; practice of law; practice of marriage and family therapy.

90-331. Unlawful use of title "Registered Practicing Counselor."

90-332. Use of title by firm.

90-333. North Carolina Board of Registered Practicing Counselors; appointments; terms; composition.

90-334. Functions and duties of the Board.

90-335. Board general provisions.

90-336. Title and qualifications for registration.

90-337. Persons certified in other states.

90-338. Temporary exemption from academic qualifications.

90-339. Renewal of certificates of registration.

90-340. Disciplinary procedures.

90-341. Violation a misdemeanor.

90-342. Injunction.

ARTICLE 1.

*Practice of Medicine.***Repeal of Article. —**

Session Laws 1981, c. 573, s. 17, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-1. North Carolina Medical Society incorporated.

The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. The name of the society is now the North Carolina Medical Society. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605; 1981, c. 573, s. 1.)

Effect of Amendments. — The 1981 amendment added the second sentence.

§ 90-2. Board of Examiners.

(a) In order to properly regulate the practice of medicine and surgery, there is established a Board of Medical Examiners of the State of North Carolina. The Board shall consist of eight members. Seven of the members shall be duly licensed physicians elected and nominated to the Governor by the North Carolina Medical Society. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor the spouse of a health care provider. For purposes of board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) No member appointed to the Board on or after November 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualifies.

(c) In order to establish regularly overlapping terms, the terms of office of the members currently serving on the Board shall expire as follows: two on October 31, 1982; two on October 31, 1984; three on October 31, 1986. Terms of Board members shall expire in direct relation to their date of appointment by the society; the terms of the two members first appointed shall expire in 1982, and the terms of the three members last appointed shall expire in 1986. No initial physician member of the Board may serve another term until at least three years from the date of expiration of his current term.

The Governor shall appoint the public member not later than October 31, 1981.

(d) Any initial or regular member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the initial or regular physician membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of physicians submitted by the North Carolina Medical Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Sess. 1921, c. 44, s. 1; 1981, c. 573, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote the former section as present sub-

section (a), and added subsections (b), (c) and (d).

CASE NOTES

Quoted in *Mebane v. Board of Medical Exmrs.*, 55 N.C. App. 455, 286 S.E.2d 112 (1982).

OPINIONS OF ATTORNEY GENERAL

Section permits physician to serve as a member of the Board for more than two three-year terms. — See opinion of Attorney General to Ms. Josephine E. Newell, M.D., President N.C. Medical Society, 51 N.C.A.G. 96 (1982).

Section does not permit North Carolina Medical Society to limit period of a physician's service on the Board. — See opinion of Attorney General to Ms. Josephine E. Newell, M.D., President N.C. Medical Society, 51 N.C.A.G. 96 (1982).

§ 90-3. Medical Society nominates Board.

The Governor shall appoint as physician members of the Board physicians elected and nominated by the North Carolina Medical Society. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C. S., s. 6607; 1981, c. 573, s. 3.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-4. Board elects officers; quorum.

The Board of Medical Examiners is authorized to elect all officers and adopt all bylaws as may be necessary. A majority of the membership of the Board shall constitute a quorum for the transaction of business. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C. S., s. 6608; 1981, c. 573, s. 4.)

Effect of Amendments. — The 1981 amendment deleted "such" preceding "officers," substituted "adopt" for "to frame" and deleted "such" preceding "bylaws" in the first sentence, deleted "and in the event of any vacancy by

death, resignation, or otherwise, of any member of said Board, the Board, or a quorum thereof, is empowered to fill such vacancy" at the end of the first sentence, and added the second sentence.

§ 90-5. Meetings of Board.

The Board of Medical Examiners shall assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may

be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C. S., s. 6609; 1935, c. 363; 1981, c. 573, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "shall" for "may" preceding "assemble" near the beginning of the section.

§ 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.

The Board of Medical Examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper.

The Board of Medical Examiners shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules and regulations to govern the performance of medical acts by registered nurses, including the determination of reasonable fees to accompany an application for approval not to exceed one hundred dollars (\$100.00) and for renewal of such approval not to exceed fifty dollars (\$50.00). The fee for reactivation of an inactive incomplete application shall be five dollars (\$5.00). Rules and regulations developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the Board of Medical Examiners and the Board of Nursing. The Board of Medical Examiners shall have responsibility for securing compliance with these regulations. (C.S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2; 1981, c. 665, s. 1; 1983, c. 53.)

Effect of Amendments. — The 1981 amendment added the language beginning "including the determination" at the end of the first sentence of the second paragraph.

The 1983 amendment, effective March 8, 1983, inserted the present second sentence of the second paragraph.

§ 90-9. Examination for license; scope; conditions and prerequisites.

It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college or an osteopathic college approved by the American Osteopathic Association at the time of his graduation, which time of graduation shall have been on January 1, 1960, or subsequent thereto and which medical and osteopathic schools shall require an attendance of not less than four years or for a lesser period of time approved by the Board, and supply such facilities for clinical and scientific instruction as shall meet the approval of the Board.

The examination shall cover the branches of medical science and subjects which the Board deems necessary to determine competence to practice medicine.

If the applicant successfully passes such examination as determined by the Board, and if the applicant satisfies the Board that he is of good moral character and that he has successfully completed one year of training after his graduation from medical school in a medical education program approved by the Board, the Board shall grant such applicant a license authorizing the applicant to practice medicine in any of its branches.

Applicants shall be examined by number only; names and other identifying information shall not appear on examination papers. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C. S., s. 6613; 1921, c. 47, s. 1; 1969, c. 612, s. 1; c. 929, s. 1; 1971, c. 1150, s. 1; 1977, c. 838, s. 1; 1981, c. 573, s. 6.)

Effect of Amendments. — The 1981 amendment deleted “also” preceding “satisfies” in the third paragraph and inserted “is of good moral

character and that he” near the middle of that paragraph.

§ 90-11. Qualifications of applicant for license.

Every applicant for a license to practice medicine or for approval to perform medical acts in the State shall satisfy the Board of Medical Examiners that such applicant is of good moral character and meets the other qualifications for the issuance of such a license or for such approval before any such license or approval is granted by the Board to such applicant. (C. S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3; 1981, c. 573, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-12. Limited license.

The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of G.S. 90-9, 90-10, and 90-11 as in its judgment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a “Limited License,” authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing medicine or surgery beyond the boundaries of the districts as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00) for each and every offense; and the Board is empowered to revoke such limited license, in its discretion, after due notice. (1909, c. 218, s. 1; C. S., s. 6616; 1967, c. 691, s. 42; 1981, c. 573, s. 8.)

Effect of Amendments. — The 1981 amendment substituted “G.S. 90-9, 90-10, and 90-11” for “the preceding sections, both as to applica-

tion for examination and examination for license” near the middle of the first sentence.

§ 90-13. When license without examination allowed.

CASE NOTES

Authority to Issue Conditional Temporary License. — Although this section does not specifically refer to the issuance of temporary

licenses, its language is broad enough to grant authority to the Board to issue temporary licenses with limited duration upon such condi-

tions as it deems advisable. *Mebane v. Board of Medical Exmrs.*, 55 N.C. App. 455, 286 S.E.2d 112, cert. denied and appeal dismissed, 305 N.C. 586, 292 S.E.2d 6 (1982).

Refusal to Issue Permanent License after Failure to Meet Condition. — A physician who was issued a temporary license to practice in this State, her further practice being conditioned on passing the Federal Licensing Exam-

ination, was not entitled to a hearing on the refusal of the Board to issue her a permanent license to practice medicine for failure to pass FLEX, on the expiration of her temporary license. *Mebane v. Board of Medical Exmrs.*, 55 N.C. App. 455, 286 S.E.2d 112, cert. denied and appeal dismissed, 305 N.C. 586, 292 S.E.2d 6 (1982).

§ 90-14. Revocation, suspension, annulment or denial of license.

(a) The Board shall have the power to deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

- (1) Immoral or dishonorable conduct;
- (2) Producing or attempting to produce an abortion contrary to law;
- (3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with his application for a license;
- (4) Repealed by Session Laws 1977, c. 838, s. 3.
- (5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against him, and the results of examination shall be admissible in evidence in a hearing before the Board;
- (6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina;
- (7) Conviction in any court of the commission of a crime involving moral turpitude, or of the violation of a law involving the practice of medicine or the conviction of a felony;
- (8) By false representations has obtained or attempted to obtain practice, money or anything of value;
- (9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he has been educated;
- (10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise;
- (11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating his failure to properly treat a patient and may require such physician to submit to inquiries or examinations, written or oral, by members of the Board or by other physicians licensed to practice medicine in this State, as the Board deems necessary to determine the professional qualifications of such licensee;

(12) Promotion of the sale of drugs, devices, appliances or goods provided for a patient in such a manner as to exploit the patient for financial gain of the physician;

(13) Suspension or revocation of a license to practice medicine in any other state, or territory of the United States, or other country.

For any of the foregoing reasons, the Board may deny the issuance of a license to an applicant or revoke a license issued to him, may suspend such a license for a period of time, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or rescinded.

(b) The Board shall refer to the State Medical Society Physician Health and Effectiveness Committee all physicians whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness. (C. S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10.)

Effect of Amendments. — The 1981 amendment added the subsection designation "(a)" at the beginning of the section, substituted "or" for a comma preceding "revoke" in the first sentence of the last paragraph of subsection (a) and

substituted "him" for "it" following "issued to" in that sentence, and added subsection (b).

Legal Periodicals. — For a note on advertising by health care professionals, see 2 Campbell L. Rev. 173 (1980).

§ 90-14.2. Hearing before revocation or suspension of a license.

CASE NOTES

Refusal to Issue Permanent License after Failure to Meet Condition of Temporary License. — Physician who was issued a temporary license to practice in this State, her further practice being conditioned on passing the Federal Licensing Examination, was not entitled to a hearing on the refusal of the Board to

issue her a permanent license to practice medicine for failure to pass FLEX, on expiration of her temporary license. *Mebane v. Board of Medical Exmrs.*, 55 N.C. App. 455, 286 S.E.2d 112, cert. denied and appeal dismissed, 305 N.C. 586, 292 S.E.2d 6 (1982).

§ 90-14.4. Place of hearings for revocation or suspension of license.

Upon written request of the accused physician to the secretary of the Board within 20 days after service of the charges or complaints against him, a hearing for the purpose of determining revocation or suspension of his license shall be conducted in the county in which such physician maintains his residence, or at the election of the Board, in any county in which the act or acts complained of occurred. In the absence of such request, the hearing shall be held at a place designated by the Board, or as agreed upon by the physician and the Board. (1953, c. 1248, s. 3; 1981, c. 573, s. 11.)

Effect of Amendments. — The 1981 amendment deleted "given" following "accused physi-

cian" and inserted "within" preceding "20 days" in the first sentence.

§ 90-14.8. Appeal from Board's decision revoking or suspending a license.

A physician whose license is revoked or suspended by the Board may obtain a review of the decision of the Board in the Superior Court of Wake County or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State, upon filing with the secretary of the Board a written notice of appeal within 20 days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within 30 days after the receipt of a notice of appeal as herein provided, the Board shall prepare, certify and file with the clerk of the superior court in the county to which the appeal is directed the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3; 1981, c. 573, s. 12.)

Effect of Amendments. — The 1981 amendment deleted "either by an applicant or a licensee" preceding "the Board shall prepare" near the beginning of the second paragraph.

§ 90-14.12. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1953, c. 1248, s. 3; 1981, c. 573, s. 13.)

Effect of Amendments. — The 1981 amendment added the second sentence.

§ 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.

The chief administrative officer of every licensed hospital or other health care institution in the State shall, after consultation with the chief of staff of such institution, report to the Board any revocation, suspension, or limitation of a physician's privileges to practice in that institution. Each such institution shall also report to the Board resignations from practice in that institution by persons licensed under this Article. The Board shall report all violations of this subsection known to it to the licensing agency for the institution involved.

Any person making a report required by this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14.)

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of two hundred dollars (\$200.00) before being admitted to the examination. Whenever any license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of one hundred dollars (\$100.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the treasurer of the Board a fee of fifty dollars (\$50.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of ten dollars (\$10.00). A fee of ten dollars (\$10.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but shall not exceed ten dollars (\$10.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sums of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15.)

Effect of Amendments. — The 1981 amendment inserted "is granted" following "education or training" near the end of the third sentence of the first paragraph.

§ 90-18. Practicing without license; practicing defined; penalties.

No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical

injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

- (1) The administration of domestic or family remedies in cases of emergency.
- (2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.
- (3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.
- (4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.
- (5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.
- (6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.
- (7) The practice of midwifery as defined in G.S. 90-178.2.
- (8) The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.
- (9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially G.S. 90-129.
- (10) The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic as defined by law, and without the use of any drug or surgery.
- (11) The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.
- (12) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this Article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X ray. Any person shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X rays; or who treats any disease or condition of the human body by the application of X rays or radium. Nothing in this subdivision shall prevent the practice of radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12 of this Chapter.
- (13) Any act, task or function performed by an assistant to a person licensed as a physician by the Board of Medical Examiners when
 - a. Such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and
 - b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered;

Provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

- (14) The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the Board of Medical Examiners and the Board of Nursing and adopted by both boards. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C.S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; 1967, c. 263, s. 1; 1969, c. 612, s. 5; c. 929, s. 3; 1971, c. 817, s. 1; c. 1150, s. 6; 1973, c. 92, s. 1; 1983, c. 897, s. 2.)

Editor's Note. — Session Laws 1983, c. 897, s. 3, provides: "This act shall become effective October 1, 1983. Any person who on October 1, 1983, had been a practicing midwife in North Carolina for more than 10 years may continue to assist at childbirth without approval under this Article. Any other person authorized to practice midwifery on September 30, 1983, may

continue to practice midwifery without approval under this Article until April 1, 1984. No annual fee shall be collected for 1983."

Effect of Amendments. — The 1983 amendment, in subdivision (7), substituted "as defined in G.S. 90-178.2" for "by any woman who pursues the vocation of midwife."

CASE NOTES

I. GENERAL CONSIDERATION.

Psychologist. — While not specifically exempted by this section, a psychologist who limits himself to the practice of psychology and the rendering of professional psychological services as defined in § 90-270.2(d) and (e) is

exempt from this section to that extent. *Wesley v. Greyhound Lines*, 47 N.C. App. 680, 268 S.E.2d 855, cert. denied, 301 N.C. 239, 283 S.E.2d 136 (1980).

Cited in State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

OPINIONS OF ATTORNEY GENERAL

The determination of death is regarded as "practicing medicine or surgery" as defined in this section. See opinion of Attorney General to

Page Hudson, M.D., Chief Medical Examiner, Medical Examiner Section, Division of Health Services, 49 N.C.A.G. 206 (1980).

§ 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

In case of the violation of the criminal provisions of G.S. 90-18, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the district attorney of the district in which the offense was committed to institute a criminal action against the offending persons. A district attorney's fee of five dollars (\$5.00) shall be allowed and collected in accordance with the provisions of G.S. 6-12. The Board of Medical Examiners may also employ, at their own expense, special counsel to assist the Attorney General or the district attorney.

Exclusive original jurisdiction of all criminal actions instituted for the violations of G.S. 90-18 shall be in the superior court, the provisions of any special

or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S., s. 6625; 1973, c. 47, s. 2; 1981, c. 573, s. 16.)

Editor's Note. — Section 6-12, referred to in this section, was repealed by Session Laws 1971, c. 269, s. 15.

Effect of Amendments. — The 1981 amend-

ment substituted "G.S. 90-18" for "G.S. 90-18 to 90-20" near the beginning of the first sentence of the first paragraph and near the middle of the second paragraph.

ARTICLE 1A.

Treatment of Minors.

§ 90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2.

OPINIONS OF ATTORNEY GENERAL

Counseling Not "Treatment". — Counseling minors for sickle cell disease and related genetic disorders does not constitute "treatment" as defined under § 90-21.2. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

Parental consent is required for counseling minors for sickle cell disease and related genetic disorders and such consent remains valid for later counseling if obtained at the time of testing. See opinion of Attorney

General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

To provide genetic counseling to minors without consent would appear to be a violation of the common-law principles governing the parent-child relationship and thus would leave the individual providing these services potentially vulnerable to litigation. See opinion to Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 181 (1980).

§ 90-21.5. Minor's consent sufficient for certain medical health services.

(a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130-81, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or commitment to a mental institution or hospital for confinement or treatment of a mental condition. This section does not prohibit the admission of a minor to a treatment facility upon his own written application in an emergency situation as authorized by G.S. 122-56.5.

(1971, c. 35; 1977, c. 582, s. 2; 1983, c. 302, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective May 13, 1983, added the last sentence of subsection (a).

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

CASE NOTES

Quoted in *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982).

Cited in *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

§ 90-21.12. Standard of health care.

CASE NOTES

This Article controls the standard of care for health care providers, including the practice of nursing. Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

This section codified the standard of health care necessary for the trier of the facts to establish a defendant's liability. *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

By adopting the similar community rule in this section, it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers and not to exclude testimony where it was shown that the witness was familiar with the standards of hospitals in adjoining and nearby communities. Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980).

It is clear from the wording of this statute that the test is not that of a statewide standard of health care, but rather a standard of practice among members of the same health care profession situated in the same or similar communities. *Dailey v. North Carolina State Bd. of Dental Exmrs.*, — N.C. App. —, 299 S.E.2d 473 (1983).

Showing Required. — In malpractice cases, plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the same or similar communities and that defendant's treatment proximately caused plaintiff's injury. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E.2d 407 (1980).

In actions for damages for personal injury arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care, the health care provider's liability is conditioned on proof by the plaintiff that the

care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. A showing that the health care provider violated such standards of practice satisfies a plaintiff's burden of proof as to professional malpractice. *Mazza v. Huffaker*, — N.C. App. —, 300 S.E.2d 833 (1983).

In medical malpractice cases, this section requires that, in order to be entitled to recover, the plaintiff must show that the defendant physician provided the plaintiff with a level of care not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. Generally, expert testimony is necessary to establish this standard of care. *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

In order to withstand a motion for a directed verdict under this section, plaintiff must offer evidence which establishes the following elements: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Failure to establish sufficient evidence on any one element entitles the defendant to a directed verdict. *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E.2d 566, reconsideration of denial of cert. denied, 304 N.C. 195, 291 S.E.2d 148 (1981).

Standard Must Be Established by Other Practitioners or Experts. — In malpractice cases the applicable standard of care must be established by other practitioners in the particular field of practice or by other expert witnesses equally familiar and competent to testify to that limited field of practice. *Lowery v.*

Newton, 52 N.C. App. 234, 278 S.E.2d 566, reconsideration of denial of cert. denied, 304 N.C. 195, 291 S.E.2d 148 (1981).

Usually the question of what is the standard of care required of a physician or surgeon is one concerning highly specialized knowledge with respect to which a layman can have no reliable information. As to this, both the court and jury must be dependent on expert testimony. Ordinarily there can be no other guide. *Mazza v. Huffaker*, — N.C. App. —, 300 S.E.2d 833 (1983).

Testimony as to Standard in Similar Communities. — An expert witness, otherwise qualified, may state his opinion as to whether the treatment and care given by the defendant to the particular patient came up to the standard prevailing in similar communities, with which the witness is familiar, even though the witness be not actually acquainted with actual medical practices in the particular community in which the service was rendered at the time it was performed. *Howard v. Piver*, 53 N.C. App. 46, 279 S.E.2d 876 (1981).

It is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant as long as the witness is familiar with the standard. Moreover, as long as the witness is shown to be familiar with the applicable standard of care, the fact that the question asked to the witness does not track the language of this section does not necessarily render the answer inadmissible. *Warren v. Canal Indus., Inc.*, — N.C. App. —, 300 S.E.2d 557 (1983).

Expert Need Not Have Practiced at Time of Alleged Act. — It would be unduly restrictive under this section to require an expert to have knowledge of the standard of care in a similar community at the time of the alleged act only by having practiced in the particular field at that time. *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Expert Testimony Not Always Required. — It has never been the rule in this State that expert testimony is needed in all medical malpractice cases to establish either the standard of care or proximate cause. Indeed, when the jury, based on its common knowledge and experience, is able to understand and judge the action of a physician or surgeon, expert testimony is not needed. *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259, cert. denied, 306 N.C. 743, 295 S.E.2d 479 (1982).

Use of Nonexpert Testimony to Show Departure from Standard of Care. — Once the standard of care is established, whether by expert or nonexpert testimony, a doctor's departure from that standard of care may be shown by nonexpert witnesses. *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259, cert. denied, 306 N.C. 743, 295 S.E.2d 479 (1982).

Quoted in *Roberts v. Durham County Hosp. Corp.*, 56 N.C. App. 533, 289 S.E.2d 875 (1982).

Stated in *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

Cited in *Hart v. Warren*, 46 N.C. App. 672, 266 S.E.2d 53 (1980); *Wall v. Stout*, — N.C. App. —, 301 S.E.2d 467 (1983).

§ 90-21.13. Informed consent to health care treatment or procedure.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2. As to

application of this section to treatment of prisoners' self-inflicted injuries, see § 148-46.2.

CASE NOTES

Applicability to Cases Pending on Effective Date. — This section became effective on July 1, 1976, and expressly did not apply to cases pending on that date. *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Causes Arising But Not Pending Before Effective Date. — There is no provision in this section regarding applicability to causes of action which arose before the effective date but in which no litigation was pending on the effective date, and this section therefore must apply to litigation which commenced after the effective date of July 1, 1976. *Simons v. Georgiade*,

55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Section Codifies Standard of Health Care. — Subdivision (a)(1) of this section establishes the standard required of health care providers in obtaining the consent of the patient to be "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities," which was also the standard in this State prior to the statute. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Subdivision (a)(2) establishes an objective standard to determine whether the

patient would have obtained a general understanding of the procedures or treatments contemplated and of the usual and most frequent risks and hazards inherent in them. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Subdivision (a)(3) establishes an objective standard to determine whether the patient would have undergone the proposed treatment or procedure had he been advised by the health care provider in accordance with the statute. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

"Reasonable Person" Test. — This section, governing informed consent to health care treatment or procedure, utilizes a "reasonable person" test to show a valid consent. *Simons v. Georgiade*, 55 N.C. App. 483, 286 S.E.2d 596, cert. denied, 305 N.C. 587, 292 S.E.2d 571 (1982).

Subsection (d) Applicable in Contract

Actions. — Subsection (d) clearly and unequivocally relates to an agreement, a contract, between the health care provider and the patient to achieve a definite result, and thus is applicable to actions brought on a theory of contract as well as actions brought on malpractice theories. *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780, appeal dismissed and cert. denied, 304 N.C. 392, 285 S.E.2d 833 (1981).

Consent to Radiation Therapy. — In order to receive the benefits of subdivision (a)(1) of this section, defendant radiologists had a positive duty to obtain the informed consent of plaintiff to the radiation therapy in accordance with the subdivision; they could not shift their duty to the referring physician. *Nelson v. Patrick*, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Cited in *McPherson v. Ellis*, 305 N.C. 266, 287 S.E.2d 892 (1982).

§ 90-21.14. First aid or emergency treatment; liability limitation.

Cross References. — As to application of this section to surgical operations on inmates of State penal institutions, see § 148-22.2. As to

application of this section to treatment of prisoners' self-inflicted injuries, see § 148-46.2.

ARTICLE 2.

Dentistry.

Repeal of Article. —

Session Laws 1981, c. 751, s. 8, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one

person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

- (2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.
- (3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.
- (4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.
- (5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.
- (6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope
 Signature of Voter
 Address of Voter

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.
2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.
2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.
3. In the event that only one of the nominees receives a majority, he shall be declared elected and the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.

4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.
 - c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.
 - (10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.
 - (11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.
 - (12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.
 - (13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.
 - (14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes of North Carolina.
 - (15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.
- (1935, c. 66, s. 1; 1957, c. 592, s. 1; 1961, c. 213, s. 1; 1971, c. 755, s. 1; 1973, c. 1331, s. 3; 1979, 2nd Sess., c. 1195, ss. 1-5; 1981, c. 751, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment substituted "by a majority vote of the remaining members of the Board to serve until the next regular election

conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article" for "for the unexpired term by a majority vote of the remaining members of the Board" in the eleventh sentence of subsection (b), and rewrote subdivision (c)(9).

§ 90-24. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if a majority of the members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2; 1981, c. 751, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "a majority of the" for "four,"

at the beginning of the section, and preceding "members are not present."

§ 90-26. Annual and special meetings.

The North Carolina State Board of Dental Examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any majority of the members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3; 1961, c. 446, s. 1; 1981, c. 751, s. 4.)

Effect of Amendments. — The 1981 amendment substituted "majority of the" for "four" near the end of the first sentence.

§ 90-29. Necessity for license; dentistry defined; exemptions.

CASE NOTES

Cited in American Dental Servs., Inc. v. Fulp, — N.C. App. —, 301 S.E.2d 121 (1983).

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.

The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant shall be of good moral character, at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7; 1971, c. 755, s. 4; 1981, c. 751, s. 5.)

Effect of Amendments. — The 1981 amendment substituted "18" for "21" preceding "years of age" in the first sentence of the second paragraph.

§ 90-36. Licensing practitioners of other states.

The North Carolina State Board of Dental Examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five years, next preceding his or her removal and who has not, during his period of practice, been found guilty by the state regulatory agency charged with the responsibility therefor of the violation of the ethics of his profession, nor found guilty by a court of competent jurisdiction of the violation of the laws of the state which issued license to him or of the criminal laws of the United States, nor whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the state

from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that state, and for a period of five years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the state or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina State Board of Dental Examiners within the six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Dental Examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on dentists originally examined by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 9; 1971, c. 755, s. 7; 1981, c. 751, s. 6.)

Effect of Amendments. — The 1981 amendment substituted "nor" for "or" preceding "whose license to practice" near the end of the

first paragraph, and made minor changes in punctuation.

§ 90-41. Disciplinary action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

- (1) Refuse to issue a license to practice dentistry;
- (2) Refuse to issue a certificate of renewal of a license to practice dentistry;
- (3) Revoke or suspend a license to practice dentistry; and
- (4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed

dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

- (8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;
- (10) Has engaged in such immoral conduct as to discredit the dental profession;
- (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
- (12) Has been negligent in the practice of dentistry;
- (13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;
- (14) Is incompetent in the practice of dentistry;
- (15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
- (16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
- (17) Has committed any fraudulent or misleading acts in the practice of dentistry;
- (18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;
- (19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;
- (20) Repealed by Session Laws 1981, c. 751, s. 7.
- (21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;
- (22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;
- (23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;
- (24) Is a menace to the public health by reason of having a serious communicable disease;
- (25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or
- (26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(1935, c. 66, s. 14; 1957, c. 592, s. 7; 1965, c. 163, s. 4; 1967, c. 451, s. 1; 1971, c. 755, s. 9; 1979, 2nd Sess., c. 1195, ss. 7, 8; 1981, c. 751, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment deleted subdivision (a)(20), which read "Has used or permitted an-

other to use his name, as a dentist, in promoting the sale or advertisement of any product or service."

Legal Periodicals. — For a note on advertising by health care professionals, see 2 Campbell L. Rev. 173 (1980).

CASE NOTES

Cited in Dailey v. North Carolina State Bd. of Dental Exmrs., — N.C. App. —, 299 S.E.2d 473 (1983).

ARTICLE 4.

Pharmacy.

Repeal of Article. —

Session Laws 1981, c. 717, s. 10, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

Part 1. Practice of Pharmacy.

§§ 90-53 to 90-75: Recodified as §§ 90-85.2 to 90-85.26, 90-85.32 to 90-85.40.

Editor's Note. — Part 1 of this Article was rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982, and has

been recodified, along with certain sections from Part 1A of this Article, as Article 4A, §§ 90-85.2 through 90-85.40.

Part 1A. Drug Product Selection.

§§ 90-76.1 to 90-76.5: Recodified as §§ 90-85.27 to 90-85.31 pursuant to Session Laws 1981 (Regular Session, 1982), c. 1188, s. 3, effective July 1, 1982.

§ **90-76.6:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 4, effective July 1, 1982.

Part 2. Dealing in Specific Drugs Regulated.

§§ **90-77 to 90-80.1:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5, effective July 1, 1982.

§ **90-85.1:** Repealed by Session Laws 1981 (Regular Session, 1982), c. 1188, s. 5, effective July 1, 1982.

ARTICLE 4A.

North Carolina Pharmacy Practice Act.

§ **90-85.2. Legislative findings.**

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of pharmacy is necessary to insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

Editor's Note. — This Article is Part 1 of Article 4 of this Chapter as rewritten by Session Laws 1981 (Reg. Sess., 1982), c. 1188, effective July 1, 1982. Sections 90-76.1 through 90-76.5 from Part 1A of Article 4 were transferred and renumbered by s. 3 of the same 1981 (Reg. Sess.,

1982) act, and are incorporated in this Article and recodified as §§ 90-85.27 through 90-85.31. Where appropriate, the historical citations to the sections in former Part 1 of Article 4 have been added to corresponding sections in this Article.

§ **90-85.3. Definitions.**

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug or device from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, that is required by law to be dispensed only pursuant to a prescription order.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for

subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:

- (1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;
- (2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;
- (3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and,
- (4) Any article intended for use as a component of any articles specified in clause (1), (2) or (3) of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(l) "License" means a license to practice pharmacy including a renewal license issued by the Board.

(m) "Permit" means a permit to operate a pharmacy or dispense devices, including a renewal license issued by the Board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(r) "Practice of pharmacy" means the responsibility for: interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-85.27 through G.S. 90-85.31. A pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules and regulations adopted by each of the Boards of Pharmacy, the Board of Nursing, and the Board of Medical Examiners of the State of North Carolina. Such rules and regulations shall be designed to ensure the safety and health of the patients for whom such drugs are administered.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 1-3.)

Effect of Amendments. — The 1983 amendment, effective April 20, 1983, in subsection (r) inserted a colon following "responsibility for" near the beginning of the first sentence, substi-

tuted "G.S. 90-85.27 through G.S. 90-85.31" for "G.S. 90-59" at the end of the second sentence and deleted "licensed" preceding "pharmacist" near the beginning of the third sentence.

§ 90-85.4. North Carolina Pharmaceutical Association.

The North Carolina Pharmaceutical Association, and the persons composing it, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by that name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do any other things and perform any other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C. S., s. 6650; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.5. Objective of Pharmaceutical Association.

The objective of the Association is to unite the pharmacists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent and to evaluate the standard of professional thought. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C.S., s. 6651; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.6. Board of Pharmacy; creation; membership; qualification of members.

(a) Creation. — The responsibility for enforcing the provisions of this Article and the laws pertaining to the distribution and use of drugs is vested in the Board. The Board shall adopt reasonable rules for the performance of its duties. The Board shall have all of the duties, powers and authorities specifically granted by and necessary for the enforcement of this Article, as well as any other duties, powers and authorities that may be granted from time to time by other appropriate statutes.

(b) Membership. — The Board shall consist of six members, one of whom shall be a representative of the public, and the remainder of whom shall be pharmacists.

(c) Qualifications. — The public member of the Board shall not be a health care provider or the spouse of a health care provider. He shall not be enrolled in a program to prepare him to be a health care provider. The public member of the Board shall be a resident of this State at the time of his appointment and while serving as a Board member. The pharmacist members of the Board shall be residents of this State at the time of their appointment and while serving

as Board members. (1905, c. 108, ss. 5-7, 9; Rev., ss. 4473, 4475; 1907, c. 113, s. 1; C. S., ss. 6652, 6654; 1945, c. 572, s. 1; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.7. Board of Pharmacy; selection; vacancies; commission; term; removal.

(a) The Board of Pharmacy shall consist of six persons. Five of the members shall be licensed as pharmacists within this State and shall be elected and commissioned by the Governor as hereinafter provided. Pharmacist members shall be chosen in an election held as hereinafter provided in which every person licensed to practice pharmacy in North Carolina and residing in North Carolina shall be entitled to vote. Each pharmacist member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Members chosen by election under this section shall be elected upon the expiration of the respective terms of the members of the present Board of Pharmacy. No pharmacist shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice pharmacy in North Carolina. In case of death, resignation or removal from the State of any pharmacist member of said Board, the pharmacist members of the Board shall elect in his place a pharmacist who meets the criteria set forth in this section to fill the unexpired term.

One member of the Board shall be a person who is not a pharmacist and who represents the interest of the public at large. The Governor shall appoint this member.

All Board members serving on June 30, 1982, shall be eligible to complete their respective terms. No member appointed or elected to a term on or after July 1, 1982, shall serve more than two complete consecutive three-year terms. The Governor may remove any member appointed by him for good cause shown and may appoint persons to fill unexpired terms of members appointed by him.

It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law.

(b) All nominations and elections of pharmacist members of the Board shall be conducted by the Board of Pharmacy, which is hereby constituted a Board of Pharmacy Elections. Every pharmacist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of pharmacists shall constitute the registration list for elections. The Board of Pharmacy Elections is authorized to make rules and regulations relative to the conduct of these elections, provided such rules and regulations are not in conflict with the provisions of this section and provided that notice shall be given to all pharmacists residing in North Carolina. All such rules and regulations shall be adopted subject to the procedures of Chapter 150A of the General Statutes of North Carolina. From any decision of the Board of Pharmacy Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes.

(c) All rules, regulations, and bylaws of the North Carolina Board of Pharmacy so far as they are not inconsistent with the provisions of this Article, shall continue in effect. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652; 1981, c. 717, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, s. 4.)

Effect of Amendments.—The 1983 amendment, effective April 20, 1983, substituted "1982" for "1981" in two places in the third paragraph of subsection (a).

§ 90-85.8. Organization.

The Board shall elect from its members a president, vice-president, and other officers as it deems necessary. The officers shall serve one-year terms and until their successors have been elected and qualified. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.9. Meetings.

The Board shall meet at least twice annually for the purpose of administering examinations and conducting other business. Four Board members constitute a quorum. The Board shall keep a record of its proceedings, a register of all licensed persons, and a register of all persons to whom permits have been issued. The Board shall report, in writing, annually to the Governor and the presiding officer of each house of the General Assembly. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.10. Employees; Executive Director.

The Board shall employ as Executive Director a pharmacist to serve as a full-time employee of the Board. The Executive Director shall serve as secretary and treasurer of the Board and shall perform administrative functions as authorized by the Board. The Board shall have the authority to employ other personnel as it may deem necessary to carry out the requirements of this Article. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C. S., s. 6654; 1945, c. 572, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.11. Compensation of employees.

The Board shall determine the compensation of its employees. Employees shall be reimbursed for all necessary expenses incurred in the performance of their official duties. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.12. Executive Director to make investigations and prosecute.

(a) Upon receiving information concerning a violation of this Article, the Executive Director shall promptly conduct an investigation and if he finds evidence of the violation, he may file a complaint and prosecute the offender in a Board hearing.

(b) In all prosecutions of unlicensed persons for the violation of any of the provisions of this Article, a certificate signed under oath by the Executive Director shall be competent and admissible evidence in any court of this State that the person is not licensed, as required by law. (1905, c. 108, s. 11; Rev., s. 4477; C. S., s. 6656; 1923, c. 74, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.13. Approval of schools and colleges of pharmacy.

The Board shall approve schools and colleges of pharmacy upon a finding that students successfully completing the course of study offered by the school or college can reasonably be expected to practice pharmacy safely and properly. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.14. Practical experience program.

The Board shall issue regulations governing a practical experience program. These regulations shall assure that the person successfully completing the program will have gained practical experience that will enable him to safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.15. Application and examination for licensure as a pharmacist; prerequisites.

(a) Any person who desires to be licensed as a pharmacist shall file an application with the Executive Director on the form furnished by the Board, verified under oath, setting forth the applicant's name, age, the place at which and the time that he has spent in the study of pharmacy, and his experience in compounding and dispensing prescriptions under the supervision of a pharmacist. The applicant shall also appear at a time and place designated by the Board and submit to an examination as to his qualifications for being licensed. The applicant must demonstrate to the Board his physical and mental competency to practice pharmacy.

(b) On or after July 1, 1982, all applicants shall have received an undergraduate degree from a school of pharmacy approved by the Board. Applicants shall be required to have had up to one year of experience, approved by the Board, under the supervision of a pharmacist and shall pass the required examination offered by the Board. Upon completing these requirements and upon paying the required fee, the applicant shall be licensed. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, s. 5.)

Effect of Amendments. — The 1983 amendment, effective April 20, 1983, substituted "spent" for "spend" in the first sentence of subsection (a).

§ 90-85.16. Examination.

The license examination shall be given by the Board at least twice each year. The Board shall determine the subject matter of each examination and the place, time and date for administering the examination. The Board shall also determine which persons have passed the examination. The examination shall be designed to determine which applicants can reasonably be expected to safely and properly practice pharmacy. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481; 1981, c. 717, s. 4; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.17. License renewal.

In accordance with Board regulations, each license to practice pharmacy shall expire on December 31 and shall be renewed annually by filing with the Board on or after December 1 an application for license renewal furnished by the Board, accompanied by the required fee. It shall be unlawful to practice pharmacy more than 60 days after the expiration date without renewing the license. All licensees shall give the Board notice of a change of mailing address or a change of place of employment within 30 days after the change. The Board may require licensees to obtain up to 10 hours of continuing education from Board-approved providers as a condition of license renewal. (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C. S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.18. Approval of continuing education programs.

The Board shall approve providers of continuing education programs upon finding that the provider is competent to and does offer an educational experience designed to enable those who successfully complete the program to more safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.19. Reinstatement.

Whenever a pharmacist who has not renewed his license for five or more years seeks to renew or reinstate his license, he must appear before the Board and submit evidence that he can safely and properly practice pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.20. Licensure without examination.

(a) The Board may issue a license to practice pharmacy, without examination, to any person who is licensed as a pharmacist in another jurisdiction if the applicant shall present satisfactory evidence of possessing the same qualifications as are required of licensees in this State, that he was licensed by examination in such other jurisdiction, and that the standard of competence required by such other jurisdiction is substantially equivalent to that of this State at that time. The Board must be satisfied that a candidate for licensure has a satisfactory understanding of the laws governing the practice of pharmacy and distribution of drugs in this State.

(b) An applicant who has taken and failed to pass the examination for licensure in North Carolina after July 1, 1977, shall not be granted reciprocal licensure in this State until having completed at least five years of the practice of pharmacy in another state. (1905, c. 108, s. 16; Rev., s. 4482; C. S., s. 6660; 1945, c. 572, s. 2; 1971, c. 468; 1977, c. 598; 1981, c. 717, ss. 6, 7; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 6, 7.)

Effect of Amendments. — The 1983 amendment, effective April 20, 1983, substituted "in another jurisdiction if the applicant" for "in another jurisdiction of the applicant" in the first

sentence of subsection (a), and substituted "pass the examination" for "pass an examination" near the beginning of subsection (b).

§ 90-85.21. Pharmacy permit.

In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacist personnel employed in the pharmacy. All pharmacist-managers shall notify the Board of any change in pharmacist personnel within 30 days of such change. (1927, c. 28, s. 1; 1953, c. 183, s. 2; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.22. Devices; registration.

Each place where devices are dispensed shall register annually with the Board on a form provided by the Board; provided this section shall not apply to places with current pharmacy permits. Records of devices dispensed in pharmacies or other places shall be kept in accordance with regulations promulgated by the Board of Pharmacy. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.23. License and permit to be displayed.

Every pharmacist-manager's license, every permit, and every current renewal shall be conspicuously posted in the place of business owned by or employing the person to whom it is issued. The licenses and every last renewal of all other pharmacists employed in the pharmacy must be readily available for inspection by agents of the Board. Failure to display any license or permit and the most recent renewal shall be a violation of this Article and each day that the license or permit or renewal is not displayed shall be a separate and distinct offense. (1905, c. 108, ss. 18, 26; Rev., ss. 3651, 4485; C. S., s. 6663; 1921, c. 68, s. 3; 1953, c. 1051; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.24. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, seventy-five dollars (\$75.00); for renewing the license as a pharmacist, forty dollars (\$40.00); for renewing the license of an assistant pharmacist, ten dollars (\$10.00); for licenses without examination as provided in G.S. 90-85.20, original, two hundred dollars (\$200.00); for original registration of a drugstore, two hundred dollars (\$200.00), and renewal thereof, one hundred dollars (\$100.00). All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2; 1983, c. 196, s. 8.)

Editor's Note. — This section was formerly § 90-60. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 2, effective July 1, 1982.

Effect of Amendments. — The 1983 amendment, effective April 20, 1983, substituted "G.S. 90-85.20" for "G.S. 90-64" following "without examination as provided in," and deleted "for

issuing a permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, ten dollars (\$10.00); for the renewal of permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, five dollars (\$5.00)" at the end of the first sentence.

§ 90-85.25. Disaster reports.

The pharmacist in charge of a pharmacy shall report within 10 days to the Board any disaster, accident, theft, or emergency which may affect the strength, purity, or labeling of drugs and devices in the pharmacy. (1981 Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.26. Prescription orders preserved.

Every pharmacist-manager of a pharmacy shall maintain for at least three years the original of every prescription order and refill compounded or dispensed at the pharmacy except for prescription orders recorded in a patient's medical record. An automated data processing system may be used for the storage and retrieval of refill information for prescriptions pursuant to the regulations of the Board. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.27. Definitions.

As used in G.S. 90-85.28 through G.S. 90-85.31:

- (1) "Equivalent drug product" means a drug product which has the same established name, active ingredient, strength, quantity, and dosage form, and which is therapeutically equivalent to the drug product identified in the prescription;
- (2) "Established name" has the meaning given in section 502(e)(3) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 352(e)(3);
- (3) "Good manufacturing practice" has the meaning given it in Part 211 of Chapter 1 of Title 21 of the Code of Federal Regulations;
- (4) "Manufacturer" means the actual manufacturer of the finished dosage form of the drug;
- (5) "Prescriber" means anyone authorized to prescribe drugs pursuant to the laws of this State. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3; 1983, c. 196, s. 9.)

Editor's Note. — This section was formerly § 90-76.1. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

Session Laws 1983, c. 761, s. 60, provides in part: "(8) Dispensing of Generic Drugs. Notwithstanding Part 1A of Article 4 of Chapter 90 of the General Statutes, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be

considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning."

Effect of Amendments. — The 1983 amendment, effective April 20, 1983, substituted "G.S. 90-85.28 through G.S. 90-85.31" for "this Part" at the end of the introductory language.

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

(a) A pharmacist dispensing a prescription for a drug product prescribed by its brand name may select any equivalent drug product which meets the following standards:

- (1) The manufacturer's name and the distributor's name, if different from the manufacturer's name, shall appear on the label of the stock package;
- (2) It shall be manufactured in accordance with current good manufacturing practices;
- (3) Effective January 1, 1982, all oral solid dosage forms shall have a logo, or other identification mark, or the product name to identify the manufacturer or distributor;
- (4) The manufacturer shall have adequate provisions for drug recall; and
- (5) The manufacturer shall have adequate provisions for return of outdated drugs, through his distributor or otherwise.

(b) The pharmacist shall not select an equivalent drug product if the prescriber instructs otherwise by one of the following methods:

- (1) A prescription form shall be preprinted or stamped with two signature lines at the bottom of the form which read:

.....
Product Selection Permitted	Dispense as Written"

On this form, the prescriber shall communicate his instructions to the pharmacist by signing the appropriate line.

- (2) In the event the preprinted or stamped prescription form specified in (b)(1) is not readily available, the prescriber may handwrite "Dispense as Written" or words or abbreviations of the same meaning on a prescription form.
- (3) When ordering a prescription orally, the prescriber shall specify either that the prescribed drug product be dispensed as written or that product selection is permitted. The pharmacist shall note the instructions on the file copy of the prescription and retain the prescription form for the period prescribed by law.
- (c) The pharmacist shall not select an equivalent drug product unless its price to the purchaser is less than the price of the prescribed drug product. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.2. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.29. Prescription label.

The prescription label of every drug product dispensed shall contain the brand name of any drug product dispensed, or in the absence of a brand name, the established name. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.3. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.30. Prescription record.

The pharmacy file copy of every prescription shall include the brand or trade name, if any, or the established name and the manufacturer of the drug product dispensed. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.4. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.31. Prescriber and pharmacist liability not extended.

The selection of an equivalent drug product pursuant to this Article shall impose no greater liability upon the pharmacist for selecting the dispensed drug product or upon the prescriber of the same than would be incurred by either for dispensing the drug product specified in the prescription. (1979, c. 1017, s. 1; 1981 (Reg. Sess., 1982), c. 1188, s. 3.)

Editor's Note. — This section was formerly § 90-76.5. It has been recodified pursuant to Session Laws 1981 (Reg. Sess., 1982), c. 1188, s. 3, effective July 1, 1982.

§ 90-85.32. Filling and refilling regulations.

The Board may promulgate rules governing the filling, refilling and transfer of prescription orders not inconsistent with other provisions of law regarding the distribution of drugs and devices. Such regulations shall assure the safe and secure distribution of drugs and devices. Prescriptions marked PRN shall not be refilled more than one year after the date issued by the prescriber unless otherwise specified. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.33. Unit dose medication systems.

The Board may adopt regulations governing pharmacists providing unit dose medication systems. The regulations shall ensure the safe and proper distribution of drugs in the patient's best health interests. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.34. Unique pharmacy practice.

Consistent with the provisions of this Article, the Board may regulate unique pharmacy practices including, but not limited to, nuclear pharmacy and clinical pharmacy, to ensure the best interests of patient health and safety. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.35. Availability of patient records.

Pharmacists employed in health care facilities shall have access to patient records maintained by those facilities when necessary for the pharmacist to provide pharmaceutical services. The pharmacist shall make appropriate entries in patient records. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.36. Availability of pharmacy records.

(a) Except as provided in subsections (b) and (c) below, written prescription orders on file in a pharmacy are not public records and any person having custody of or access to the prescription orders may divulge the contents or provide a copy only to the following persons:

- (1) An adult patient for whom the prescription was issued or a person who is legally appointed guardian of that person;
- (2) An emancipated minor patient for whom the prescription order was issued or a person who is the legally appointed guardian of that patient;
- (3) An unemancipated minor patient for whom the prescription order was issued when the minor's consent is sufficient to authorize treatment of the condition for which the prescription was issued;
- (4) A parent or person in loco parentis of an unemancipated minor patient for whom the prescription order was issued when the minor's consent is not sufficient to authorize treatment for the condition for which the prescription is issued;
- (5) The licensed practitioner who issued the prescription;
- (6) The licensed practitioner who is treating the patient for whom the prescription was issued;
- (7) A pharmacist who is providing pharmacy services to the patient for whom the prescription was issued;
- (8) Anyone who presents a written authorization for the release of pharmacy information signed by the patient or his legal representative;
- (9) Any person authorized by subpoena, court order or statute;
- (10) Any firm, association, partnership, business trust, corporation or company charged by law or by contract with the responsibility of providing for or paying for medical care for the patient for whom the prescription order was issued;
- (11) A member or designated employee of the Board;
- (12) The executor, administrator or spouse of a deceased patient for whom the prescription order was issued;
- (13) Researchers and surveyors who have approval from the Board. The Board shall issue this approval when it determines that there are adequate safeguards to protect the confidentiality of the information

contained in the prescription orders and that the researchers or surveyors will not publicly disclose any information that identifies any person; or

(14) The person owning the pharmacy or his authorized agent.

(b) A pharmacist may disclose any information to any person only when he reasonably determines that the disclosure is necessary to protect the life or health of any person.

(c) Records required to be kept by G.S. 90-93(d) (Schedule V) are not public records and shall be disclosed at the pharmacist's discretion. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.37. Embargo.

Notwithstanding any other provisions of law, whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health, he shall affix to the drug or device a notice that the article is suspected of being dangerous to the public health and warning all persons not to remove or dispose of the article. Whenever an authorized representative of the Board has reasonable cause to believe that any drug or device presents a danger to the public health and that there are reasonable grounds to believe that it might be disposed of pending a judicial resolution of the matter, he shall seize the article and take it to a safe and secure place. When an article has been embargoed under this section, the Board shall, as soon as practical, file a petition in Orange County District Court for a condemnation order for such article. If the judge determines after hearing, that the article is not dangerous to the public health, the Board shall direct the immediate removal of the tag or other marking, and where appropriate, shall direct that the article be returned to its owner. If the judge finds the article is dangerous to the public health, he shall order its destruction at the owner's expense and under the Board's supervision. If the judge determines that the article is dangerous to the public health, he shall order the owner of the article to pay all court costs, reasonable attorney's fees, storage fees, and all other costs incident to the proceeding. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.38. Disciplinary authority.

(a) The Board may, in accordance with Chapter 150A of the General Statutes, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew a license to practice pharmacy, or require licensees to successfully complete remedial education if the licensee has:

- (1) Made false representations or withheld material information in connection with securing a license or permit;
- (2) Been found guilty of or plead guilty or nolo contendere to any felony in connection with the practice of pharmacy or the distribution of drugs;
- (3) Indulged in the use of drugs to an extent that renders him unfit to practice pharmacy;
- (4) Made false representations in connection with the practice of pharmacy that endanger or are likely to endanger the health or safety of the public, or that defraud any person;
- (5) A physical or mental disability that renders him unfit to practice pharmacy with reasonable skill, competence and safety to the public;
- (6) Failed to comply with the laws governing the practice of pharmacy and the distribution of drugs;
- (7) Failed to comply with the rules and regulations of the Board;

(8) Engaged in, or aided and abetted an individual to engage in, the practice of pharmacy without a license; or

(9) Was negligent in the practice of pharmacy.

(b) The Board, in accordance with Chapter 150A of the General Statutes, may suspend, revoke, or refuse to grant or renew any permit for the same conduct as stated in subsection (a).

(c) Any license or permit obtained through false representation or withholding of material information shall be void and of no effect. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661; 1967, c. 807; 1973, c. 138; 1981, c. 412, s. 4; c. 717, s. 8; c. 747, s. 66; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.39. Injunctive authority.

The Board may apply to any court for an injunction to prevent violations of this Article or of any rules enacted pursuant to it. The court is empowered to grant the injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. (1981 (Reg. Sess., 1982), c. 1188, s. 1.)

§ 90-85.40. Violations.

(a) It shall be unlawful for any owner or manager of a pharmacy or other place to allow or cause anyone other than a pharmacist to dispense or compound any prescription drug except as an aide to and under supervision of a pharmacist.

(b) Every person lawfully authorized to compound or dispense prescription drugs shall comply with all the laws and regulations governing the labeling and packaging of such drugs by pharmacists.

(c) It shall be unlawful for any person not licensed as a pharmacist to compound or dispense any prescription drug, except as an aide to and under the supervision of a pharmacist.

(d) It shall be unlawful for any person to manage any place of business where devices are dispensed or sold at retail without a permit as required by this Article.

(e) It shall be unlawful for any person without legal authorization to dispose of an article that has been embargoed under this Article.

(f) It shall be unlawful to violate any provision of this Article or of any rules or regulations enacted pursuant to it.

(g) This Article shall not be construed to prohibit any person from performing an act that person is authorized to perform pursuant to North Carolina law. Health care providers who are authorized to prescribe drugs without supervision are authorized to dispense drugs without supervision.

(h) A violation of this Article shall be a misdemeanor punishable in the discretion of the court. (1905, c. 108, ss. 4, 23, 24; Rev., ss. 3649, 3650, 4487; C. S., ss. 6667, 6668, 6669; 1921, c. 68, ss. 6, 7; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222; 1981 (Reg. Sess., 1982), c. 1188, s. 1.)

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Controlled Substances Act did not repeal prior law controlling narcotic drugs. *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, — N.C. —, 299 S.E.2d 652 (1983).

Reference to Act in Indictment Prior to Effective Date. — The conspiracy to possess, sell, deliver, and manufacture heroin was equally a crime under the Controlled Substances Act and its predecessor, the Uniform

Narcotic Drug Act, which remained in full force and effect as to offenses committed prior to January 1, 1972. Reference in the indictments to the Controlled Substances Act did not invalidate the indictments and reference in the indictment to the specific statute allegedly violated is immaterial. *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982), cert. denied and appeal dismissed, — N.C. —, 299 S.E.2d 652 (1983).

§ 90-87. Definitions.

As used in this Article:

(3a) "Commission" means the Commission for Mental Health, Mental Retardation and Substance Abuse Services established under Part 4 of Article 3 of Chapter 143B of the General Statutes.

(6) "Counterfeit controlled substance" means:

a. A controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports, or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser; or

b. Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:

1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
2. Money or other valuable property has been exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

(14) "Immediate precursor" means a substance which the Commission has found to be and by regulation designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit such manufacture.

(23) "Prescription" means:

a. A written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article, or for a preparation, combination, or mixture thereof, issued by a practitioner who is licensed in this State to administer or prescribe drugs in the course of his professional practice; or issued by a practitioner

serving on active duty with the armed forces of the United States or the United States Veterans Administration who is licensed in this or another state or Puerto Rico, provided the order is written for the benefit of eligible beneficiaries of armed services medical care; a prescription does not include an order entered in a chart or other medical record of a patient by a practitioner for the administration of a drug; or

b. A drug or preparation, or combination, or mixture thereof furnished pursuant to a prescription order.

(25) "Registrant" means a person registered by the Commission to manufacture, distribute, or dispense any controlled substance as required by this Article.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, ss. 2-4; c. 1358, ss. 1, 15; 1977, c. 482, s. 6; 1981, c. 51, ss. 8, 9; c. 75, s. 1; c. 732.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — Session Laws 1981, c. 51, s. 8, effective July 1, 1981, added subdivision (3a).

Session Laws 1981, c. 51, s. 9, effective July 1, 1981, purported to substitute "Commission" for "North Carolina Drug Commission" in subdivisions (14) and (25) of this section. Those subdivisions actually contained the phrase "North Carolina Drug Authority." However, "Commission" has been substituted for "North Carolina Drug Authority" in subdivisions (14)

and (25), as set out above, in order to give effect to the obvious intent of the 1981 act.

Session Laws 1981, c. 75, s. 1, inserted the language beginning "or issued by" and ending "armed services medical care" near the middle of subdivision (23)a.

Session Laws 1981, c. 732, effective Oct. 1, 1981, inserted "controlled" in the phrase defined by subdivision (6), designated the original definition in subdivision (6) as paragraph a and added paragraph b in subdivision (6).

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Piland*, 58 N.C. App. 95, 293 S.E.2d 278 (1982).

Quoted in *State v. Roseboro*, 55 N.C. App. 205, 284 S.E.2d 725 (1981).

Cited in *State v. Ellers*, 56 N.C. App. 683, 289 S.E.2d 924 (1982).

IV. "MARIJUANA."

Burden of Showing Matter Seized Not

within Definition. — The burden would be upon the defendants to show that stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana," as defined by subdivision (16) of this section. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

§ 90-88. Authority to control.

(a) The Commission may add, delete, or reschedule substances within Schedules I through VI of this Article on the petition of any interested party, or its own motion. In every case the Commission shall give notice of and hold a public hearing prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article. A petition by the Commission, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the Commission, as a matter of right. Notice as required by this section shall consist of notice by one publication in three newspapers of statewide circulation qualified for legal advertising in accordance with G.S. 1-597 and 1-598. In addition, the North Carolina Department of Human Resources shall mail a notice of the proposed

change and the date and place of the public hearing to each registrant under this Article. In making a determination regarding a substance, the Commission shall consider the following:

- (1) The actual or relative potential for abuse;
- (2) The scientific evidence of its pharmacological effect, if known;
- (3) The state of current scientific knowledge regarding the substance;
- (4) The history and current pattern of abuse;
- (5) The scope, duration, and significance of abuse;
- (6) The risk to the public health;
- (7) The potential of the substance to produce psychic or physiological dependence liability; and
- (8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(b) After considering the required factors, the Commission shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article.

(c) If the Commission designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the Commission shall similarly control, or cease control of, the substance under this Article after the expiration of 30 days from publication in the Federal Register of a final order designating a substance as a controlled substance unless, within 180 days, the Commission objects to such inclusion. In such case, the Commission shall cause to be published and made public the reason for such objection and shall afford all interested parties an opportunity to be heard. At the conclusion of such meeting, the Commission shall make public its decision, which shall be final unless specifically acted upon by the North Carolina General Assembly. Upon publication of objection to inclusion under this Article by the Commission, control under this section shall automatically be stayed until such time as the Commission makes public its decision.

(e) The Commission shall exclude any nonnarcotic substance from the provisions of this Article if such substance may, under the federal Food, Drug and Cosmetic Act, lawfully be sold over-the-counter without prescription.

(g) The Commission shall similarly exempt from the provisions of this Article any chemical agents and diagnostic reagents not intended for administration to humans or other animals, containing controlled substances which either (i) contain additional adulterant or denaturing agents so that the resulting mixture has no significant abuse potential, or (ii) are packaged in such a form or concentration that the particular form as packaged has no significant abuse potential, where such substance was exempted by the Federal Bureau of Narcotics and Dangerous Drugs.

(i) The North Carolina Department of Human Resources shall maintain a list of all preparations, compounds, or mixtures which are excluded, exempted and excepted from control under any schedule of this Article by the United States Drug Enforcement Administration and/or the Commission. This list and any changes to this list shall be mailed to the North Carolina Board of Pharmacy, the State Bureau of Investigation and each district attorney of this State. (1971, c. 919, s. 1; 1973, c. 476, s. 128; cc. 524, 541; c. 1358, ss. 2, 3, 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" throughout the section.

CASE NOTES

Cited in *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163 (1982).

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

1. Mecloqualone.

2. Methaqualone. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9; 1983, c. 695, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981,

substituted "Commission" for "North Carolina Drug Commission" in the second sentence of the introductory paragraph.

The 1983 amendment, effective Oct. 1, 1983, added paragraph 2 of subdivision (d).

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

1. Alphaprodine.

2. Anileridine.

3. Bezitramide.

4. Dihydrocodeine.

5. Diphenoxylate.

6. Fentanyl.

7. Isomethadone.

8. Levomethorphan.

9. Levorphanol.

10. Metazocine.

11. Methadone.

12. Methadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
14. Pethidine.
15. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.
21. Racemorphran.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Commission or listed in another schedule:

1. Amobarbital
2. Repealed by Session Laws 1983, c. 695, s. 2, effective October 1, 1983.
3. Pentobarbital
4. Phencyclidine
5. Phencyclidine immediate precursors:
 - a. 1-Phenylcyclohexylamine
 - b. 1-Piperidinocyclohexanecarbonitrile (PCC)
6. Secobarbital. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9; 1983, c. 695, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Subsection (b) has been set out to correct a misspelled word in the bound volume.

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina

Drug Commission" in the second sentence of the introductory paragraph. "Commission" has also been substituted for "Drug Commission" in subsection (d) in order to give effect to the obvious intent of the amendment.

The 1983 amendment, effective Oct. 1, 1983, deleted paragraph 2 of subdivision (d), which read "Methaqualone."

CASE NOTES

Applied in *State v. Proctor*, 58 N.C. App. 631, 294 S.E.2d 240 (1982).

Cited in *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824 (1980).

§ 90-91. Schedule III controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a potential for abuse less than the substances listed in Schedules I and II; currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high psychological dependence. The following controlled substances are included in this schedule:

(i) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraphs (a)1 and (a)2 of this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system; and if the ingredients are included therein in such combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 5; c. 1358, ss. 7, 15; 1975, c. 442; 1977, c. 667, s. 3; 1979, c. 434, s. 3; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" in the second sentence of the introductory paragraph and near the beginning of subsection (i).

§ 90-92. Schedule IV controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(b) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active, nonnarcotic, medicinal ingredients not having a stimulant or depressant effect on the central nervous system; provided, that such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" in the second sentence of the introductory paragraph and near the beginning of subsection (b).

§ 90-93. Schedule V controlled substances.

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

1. Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic alone:

- (i) Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
- (ii) Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 milliliters or per 100 grams.
- (iii) Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
- (iv) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
- (v) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
- (vi) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

2. Loperamide.

(1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 9, 15; 1977, c. 667, s. 3; 1979, c. 434, ss. 7, 8; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to disclosure of the records required to be kept under subsection (d) of this section, see § 90-85.36.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" in the second sentence of subsection (a).

§ 90-94. Schedule VI controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that such substance comes within this schedule, the Commission shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects.

The following controlled substances are included in this schedule:

1. Marijuana.
2. Tetrahydrocannabinols. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" in the second sentence.

CASE NOTES

Neither Possession nor Possession with Intent to Sell Included in the Other. — To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount

of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other. *State v. Gooch*, 58 N.C. App. 582, 294 S.E.2d 13, rev'd on other grounds, 307 N.C. 253, 297 S.E.2d 599 (1982).

Cited in *State v. Lombardo*, 306 N.C. 594, 295 S.E.2d 399 (1982); *State v. Reddick*, 55 N.C. App. 646, 286 S.E.2d 654 (1982).

§ 90-95. Violations; penalties.

- (a) Except as authorized by this Article, it is unlawful for any person:
- (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
 - (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;
 - (3) To possess a controlled substance.
- (b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:
- (1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;
 - (2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).
- (c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.
- (d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:
- (1) A controlled substance classified in Schedule I shall be punished as a Class I felon;
 - (2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars (\$2,000), or both in the discretion of the court; but if the quantity of the controlled substance, or combination of the controlled substances, exceeds 100 tablets, capsules or other dosage units, or equivalent quantity, including one-half gram or more of phencyclidine or one gram or more of cocaine, the violation shall be punishable as a Class I felony;
 - (3) A controlled substance classified in Schedule V shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars (\$500.00), or both in the discretion of the court;
 - (4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars (\$100.00); but if the quantity of the controlled substance exceeds one ounce (avoirdupois) of marijuana or one tenth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.
- (e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:
- (1), (2) Repealed by Session Laws 1979, c. 760, s. 5.
 - (3) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than two years, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or

any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon;

- (4) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than six months, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars (\$2,000), or both in the discretion of the court;
- (5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age shall be punished as a Class E felon;
- (6) For the purpose of increasing punishment, previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial;
- (7) If any person commits an offense under this Article for which the prescribed punishment includes only a fine, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars (\$500.00), or both in the discretion of the court.

(f) Repealed by Session Laws 1975, c. 360, s. 2, effective July 1, 1975 to July 1, 1977.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

- (1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
 - a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a term of at least five years in the State's prison and shall be fined not less than five thousand dollars (\$5,000);
 - b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars (\$25,000);
 - c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000);
 - d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the

State's prison and shall be fined not less than two hundred thousand dollars (\$200,000).

- (2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:
 - a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars (\$25,000);
 - b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000);
 - c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars (\$200,000).
- (3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation of coca leaves, or any salt, compound, derivative or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:
 - a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000);
 - b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than one hundred thousand dollars (\$100,000);
 - c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined at least two hundred fifty thousand dollars (\$250,000).
- (4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:
 - a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars (\$50,000);
 - b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a term of at

least 18 years in the State's prison and shall be fined not less than one hundred thousand dollars (\$100,000);

- c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars (\$500,000).

- (5) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

- (6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

- (i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414.)

Editor's Note. —

This section, as set out above, consists of the second version of this section in the bound volume, as subsequently amended.

The amendments in Session Laws 1979, c. 760, s. 5, and Session Laws 1979, 2nd Sess., c. 1251, ss. 4-7, incorporated in the second version of this section in the bound volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the

act indicates otherwise."

Effect of Amendments. — The first 1983 amendment, effective Feb. 17, 1983, substituted "Toxicology Laboratory, Reynolds Health Center" for "Clinical Toxicological Lab, North Carolina Baptist Hospital" in subsection (g).

The second 1983 amendment, effective May 11, 1983, inserted "of cocoa leaves, or any salt, compound, derivative or preparation" near the beginning of subdivision (h)(3).

The third 1983 amendment, effective Oct. 1, 1983, substituted "by selling or delivering" for "by delivering" in subdivision (e)(5).

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. GENERAL CONSIDERATION.

Section Is Constitutional. —

The mandatory minimum sentence and fine provision of subdivision (h)(4) of this section does not violate equal protection rights and the separation of powers clause of the North Carolina Constitution in that it places impermissible legislative restraints on the judiciary and, in effect, also places sentencing powers in the hands of the prosecutor, who is a member of the executive branch. It is

well-established that the legislature has exclusive power to prescribe the punishment for crimes. The function of the court in the punishment of crimes is to determine whether an accused is guilty or innocent and, if guilty, to pronounce the penalty prescribed by the legislature. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Subdivisions (h)(4), (5) and (6) of this section are not violative of the United States or North Carolina Constitutions. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Double Jeopardy. —

Manufacturing or possession under subsection (a) of this section does not require proof of any additional facts beyond those required under subdivision (h)(1) of this section, therefore convictions under both statutes violate protection against double jeopardy. *State v. Sanderson*, — N.C. App. —, 300 S.E.2d 9 (1983).

The phrase "substantial assistance," in subdivision (h)(6), is unconstitutionally vague in defining a convicted defendant who is eligible for leniency in sentencing. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Construction of Phrase "Substantial Assistance." — Being a description of a post-conviction form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. The phrase, in any event, is susceptible of common understanding in the context of the whole statute. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Constitutional Rights Not Lost in Order to Gain Benefits from Assisting Prosecution. — Nothing in this section suggests that substantial assistance must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no Fifth Amendment privilege is obviously necessary). The risk of prosecution in other jurisdictions is acknowledged. Nonetheless, a defendant need not invoke subdivision (h)(6) of this section as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the Fifth Amendment and no constitutional deprivation results if a defendant elects to reap the benefits of subdivision (h)(6) of this section. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Statute Aimed at Large Scale Drug Activity. — The trafficking in drugs statute is aimed at an offender who is facilitating a large scale flow of drugs, and the General Assembly aimed to deal with such an offender. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

The harsh penalties prescribed in the North Carolina Controlled Substances Act represent an attempt by the legislature to deter large scale distribution of drugs and thereby to decrease the number of people potentially harmed by drug use. Therefore, subdivision (h)(4) of this section is not a violation of equal protection rights because it penalizes possession of a particular amount of any mixture containing heroin without regard to the percentage of heroin in the mixture. *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983).

Purpose of Subsections (h) and (i). — Subsection (h) of this section was added in response to a growing concern regarding the gravity of

illegal drug activity in this State and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. The purpose behind subsection (h) of this section is to deter trafficking in large amounts of certain controlled substances. *State v. Proctor*, 58 N.C. App. 631, 294 S.E.2d 240, cert. denied, 306 N.C. 749, 295 S.E.2d 484 (1982), — U.S. —, 103 S. Ct. 818, 74 L.Ed.2d 1016 (1983).

The 1979 amendments to this section, by the addition of subsections (h) and (i), are responsive to a growing concern regarding the gravity of illegal drug activity in this State and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Possession with intent to sell, etc. —

Possession of methamphetamine and sale of methamphetamine are two separate and distinct offenses, and a defendant can be convicted of both crimes and not have his constitutional rights violated. *State v. Salem*, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

The purpose behind paragraph (h)(3)(a) is to deter "trafficking" in controlled substances. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Quantity of Mixture under Paragraph (h)(3)(a) Sufficient. — The quantity of the mixture containing cocaine may be sufficient in itself to constitute a violation of paragraph (h)(3)(a). *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Words "guilty of a felony ... known as 'trafficking in marijuana'" in subsection (h) of this section relate primarily to the preceding words "50 pounds (avoirdupois) of marijuana." *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Use of the word "felony" in singular form refers to the singular crime known as "trafficking in marijuana," a crime consisting of any one or more of the denounced acts, any one of which is a separate crime. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

When Weight Element Critical in Trafficking Charge. — The weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Constitutional Rights Not Violated Where Samples, etc., of Destroyed Evidence Exist. — In prosecution under this section, destruction of marijuana by State for lack of storage facilities, where State made random

samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under N.C. Const., Art. I, § 23, nor infringe defendants' due process rights under the federal and state constitutions. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Nor Are Discovery Rights Violated. — In prosecution under this section, destruction of marijuana by State for lack of storage facilities did not violate defendant's discovery rights under § 15A-903(e) where the State made random samples, photographs and a copy of the laboratory report of the State Bureau of Investigation available to defendants. *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Burden of Showing Matter Seized Is Not Marijuana. — The burden would be upon the defendants to show that stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana," as defined by § 90-87(16). *State v. Anderson*, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Aggravating Factors under Subdivision (a)(1). — While § 15A-1340.4(a)(1) prohibits using evidence necessary to prove an element of the offense to prove a factor in aggravation, use of evidence that the offense was committed for hire or pecuniary gain and that the offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband is permissible since these two aggravating factors are not elements of subdivision (a)(1) of this section. *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Evidence of Other Drug Violations. —

In accord with original. See *State v. Willis*, — N.C. App. —, 300 S.E.2d 420 (1983); *State v. Sanderson*, — N.C. App. —, 302 S.E.2d 899 (1983).

Applied in *State v. Haynes*, 54 N.C. App. 186, 282 S.E.2d 830 (1981); *State v. Rosser*, 54 N.C. App. 660, 284 S.E.2d 130 (1981); *State v. Ellers*, 56 N.C. App. 683, 289 S.E.2d 924 (1982); *State v. Long*, 58 N.C. App. 467, 294 S.E.2d 4 (1982); *State v. Willis*, 58 N.C. App. 617, 294 S.E.2d 330 (1982); *State v. Holmes*, 59 N.C. App. 79, 296 S.E.2d 1 (1982); *State v. Williams*, 307 N.C. 452, 298 S.E.2d 372 (1983); *State v. Parker*, — N.C. App. —, 301 S.E.2d 450 (1983).

Quoted in *State v. Cuthrell*, 50 N.C. App. 195, 272 S.E.2d 616 (1980).

Stated in *State v. Lombardo*, 52 N.C. App. 316, 278 S.E.2d 318 (1981); *State v. Gray*, 56 N.C. App. 667, 289 S.E.2d 894 (1982).

Cited in *State v. Greenwood*, 47 N.C. App. 731, 268 S.E.2d 835 (1980); *State v. Cooke*, 306

N.C. 132, 291 S.E.2d 618 (1982); *State v. Gray*, 55 N.C. App. 568, 286 S.E.2d 357 (1982); *State v. Cherry*, 55 N.C. App. 603, 286 S.E.2d 368 (1982); *State v. Windham*, 57 N.C. App. 571, 291 S.E.2d 876 (1982); *State v. Rivard*, 57 N.C. App. 672, 292 S.E.2d 174 (1982); *State v. Lombardo*, 306 N.C. 594, 295 S.E.2d 399 (1982); *State v. Pearson*, 59 N.C. App. 87, 295 S.E.2d 499 (1982); *State v. Grainger*, 60 N.C. App. 188, 298 S.E.2d 203 (1982); *State v. Myrick*, — N.C. App. —, 299 S.E.2d 439 (1983); *State v. McGee*, — N.C. App. —, 299 S.E.2d 796 (1983); *State v. Byrd*, — N.C. App. —, 300 S.E.2d 16 (1983); *State v. Sugg*, — N.C. App. —, 300 S.E.2d 248 (1983); *State v. Myers*, — N.C. App. —, 301 S.E.2d 401 (1983); *State v. Bond*, — N.C. App. —, 301 S.E.2d 745 (1983).

III. SALE OR DELIVERY.

There is no separate statutory offense entitled delivery of marijuana. Subdivision (b)(2) of this section, however, describes a situation limited in its applicability to the delivery of marijuana. If defendant transfers less than five grams of marijuana and receives no remuneration, he is not guilty of a delivery in violation of subdivision (a)(1) of this section. *State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

When Offense of Delivery Complete. — The offense of delivery under this section is complete when there has been a transfer of a controlled substance. *State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Proof of Remuneration Not Required. — It is not necessary for the State to prove that defendant received remuneration for the transfer. *State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Nor Quantity Transferred. —

The State is not required initially to prove the quantity transferred. *State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Variance which stated defendant sold 28 grams of cocaine, rather than 28 grams of a mixture containing cocaine, as described in paragraph (h)(3)(a), was not fatal. *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575 (1981).

Conspiracy to Sell and Deliver Not Found. — Since where one of two persons who allegedly conspired to do an illegal act is an officer of the law acting in discharge of his duties and intends to frustrate the conspiracy, the other person cannot be convicted of conspiracy, it was error for the trial court to instruct the jury that defendant could be convicted of conspiracy to sell and deliver over 50 pounds of marijuana if he conspired only with undercover agent to sell and deliver the marijuana. *State v.*

Hammette, 58 N.C. App. 587, 293 S.E.2d 824 (1982).

Verdicts of Guilty of Sale but Not Guilty of Possession. — A court does not err in not setting aside a guilty verdict on the sale of marijuana when the verdict for possession with intent to sell was not guilty. The courts have treated sale and possession with intent to sell a controlled substance as two separate offenses. Possession is not an element of sale and sale is not an element of possession. *State v. Paul*, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

Where the State does not "conclusively" prove that the defendant made the sale without possession, but merely failed to prove possession, verdicts of guilty of sale of marijuana but not guilty of possession of marijuana with intent to sell are not inconsistent. *State v. Paul*, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982).

IV. POSSESSION.

A. In General.

Types of Possession.—

In accord with original. See *State v. Reddick*, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982).

Establishing Possession.—

In accord with 1st paragraph in original. See *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

In accord with 2nd paragraph in original. See *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

In accord with 3rd paragraph in original. See *State v. Reddick*, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982); *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

An accused has possession of a controlled substance within the meaning of this section when he has both the power and the intent to control its disposition or use. Possession does not require ownership of the controlled substance. *State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

Circumstantial Evidence.—

In accord with 1st paragraph in original. See *State v. Reddick*, 55 N.C. App. 646, 286 S.E.2d 654, cert. denied, 305 N.C. 398, 290 S.E.2d 368 (1982).

Finding of Not Guilty of Possession but Guilty of Manufacture. — Failure of the jury to find the defendants guilty of the possession of marijuana does not preclude it from finding defendants guilty of manufacturing the illicit drug, as a jury is not required to be consistent, and mere inconsistency will not invalidate a verdict. *State v. Rosser*, 54 N.C. App. 660, 284 S.E.2d 130 (1981).

Elements of Possession of More Than One Ounce. — To prove the offense of possession of over one ounce of marijuana under subdivision (d)(4) of this section, the State must prove two elements: (1) possession by defendant, and (2) that the amount possessed was greater than one ounce. The trial court must give proper instructions with respect to each of these elements. *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982).

Simple Possession and Possession of Over One Ounce Compared. — The sole distinction between the offenses of possession of more than one ounce of marijuana, subdivision (d)(4) of this section and simple possession of marijuana, subdivision (a)(3) of this section, is the element of amount. In the former, the jury must find that defendant possessed more than one ounce; in the latter, possession of any amount is sufficient for conviction. Otherwise, the elements of the two offenses are the same. *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982).

Proof of Conspiracy to Possess. — Although it is not necessary for the state to prove defendant personally possessed marijuana in order to convict him of conspiracy to possess marijuana, it is necessary to offer evidence from which the jury could reasonably infer that he agreed with someone else to possess it. *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982).

Failure to Instruct as to Quantity under Subdivision (d)(4). — Possession of more than one ounce of marijuana is an essential element of the offense under subdivision (d)(4) of this section and the trial judge's failure to so charge is error. *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982).

B. Possession with Intent to Sell or Deliver.

Elements of Offense. — The offense of possession with intent to sell or deliver has three elements. One, there must be possession of a substance. Two, the substance must be a controlled substance. Three, there must be intent to distribute or sell the controlled substance. *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

Quantity of Drugs Seized Not an Element. — Although the quantity of drugs seized is evidence of the intent to sell, it is not an element of subdivision (a)(1) of this section. *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Possession of Certain Amounts Indicates Intent to Distribute on Large Scale. — The Legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases

the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under subdivision (1) of subsection (a) of this section. *State v. Proctor*, 58 N.C. App. 631, 294 S.E.2d 240, cert. denied, 306 N.C. 749, 295 N.C. 484 (1982). — U.S. —, 103 S. Ct. 818, 74 L. Ed. 2d 1016 (1983).

Possession with intent to sell and sale are not alternative offenses, but separate offenses. *State v. Stoner*, 59 N.C. App. 656, 298 S.E.2d 66 (1982).

Simple Possession Is Lesser Included Offense. — Simple possession of marijuana under subdivision (a)(3) of this section — unlike possession of more than one ounce of marijuana under subdivision (d)(4) of this section — is a lesser included offense of possession of marijuana with intent to manufacture, sell or deliver, subdivision (a)(1) of this section. *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982).

In proving intent, etc. —

Although the State has the burden of proving that the defendant intended to sell or deliver the controlled substance, it may rely upon ordinary circumstantial evidence such as the amount of the controlled substance possessed

and the nature of its packaging and labeling to carry the burden. *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances but proof of such exemption through authorization must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Entrapment No Defense Where Essential Elements of the Offense Denied. — Where a defendant was prosecuted for possession with intent to sell and sale and delivery of LSD, the question of entrapment did not arise from defendant's evidence since entrapment is not available as a defense when the accused denies the essential elements of the offense. *State v. Neville*, 49 N.C. App. 678, 272 S.E.2d 164 (1980), *aff'd*, 302 N.C. 623, 276 S.E.2d 373 (1981).

§ 90-95.1. Continuing criminal enterprise.

Effect of Amendments. —

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the bound volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-95.2. Cooperation between law-enforcement agencies.

(a) The head of any law-enforcement agency may temporarily provide assistance to another agency in enforcing the provisions of this Article if so requested in writing by the head of the other agency. The assistance may comprise allowing officers of the agency to work temporarily with officers of the other agency (including in an undercover capacity) and lending equipment and supplies. While working with another agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges, and immunities (including those relating to the defense of civil actions and payment of judgments) as the officers of the requesting agency in addition to those he normally possesses. While on duty with the other agency, he shall be subject to the lawful operational commands of his superior officers in the other agency, but he shall for personnel and administrative purposes remain under the control of his own agency, including for purposes of pay. He shall furthermore be entitled to workmen's compensation when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties.

(1975, c. 782, s. 1; 1981, c. 93, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 97-1.1 provides that references to "workmen's compensation"

shall be deemed to refer to "workers' compensation."

Effect of Amendments. — The 1981 amendment added the parenthetical language in the third sentence of subsection (a).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

- (1) There is no drug education school within a reasonable distance of the defendant's residence; or
- (2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities

imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment substituted "those" for "controlled" following "state relating to" in the first sentence of subsection (a), substituted "Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90" for "any schedule of this Article," substituted "Schedules II through VI" for "Schedules III through VI," and inserted "or by possessing drug paraphernalia as prohibited by G.S. 90-113.21" in that sentence, added the third sentence in subsection (a), inserted "or G.S. 90-113.14" in the seventh sentence of subsec-

tion (a), inserted "to determine discharge and dismissal" in the eighth sentence of subsection (a), added the last sentence in subsection (a), added subsection (a1), substituted "Schedules II through VI" for "Schedules III through VI" in the first sentence of subsection (d), and added subsection (e). The amendments in subsections (a) and (a1) are made effective October 1, 1981, while the amendments in subsections (d) and (e) are made effective upon ratification. The act was ratified July 10, 1981.

Legal Periodicals. — For an article entitled, "Prior Crimes As Evidence In Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

§ 90-96.01. Drug education schools; responsibilities of the Department of Human Resources; fees.

(a) The Commission for Mental Health, Mental Retardation, and Substance Abuse Services shall establish standards and guidelines for the curriculum and operation of local drug education programs. The Department of Human Resources shall oversee the development of a statewide system of schools and shall insure that schools are available in all localities of the State as soon as is practicable.

(1) A fee of one hundred dollars (\$100.00) shall be paid by all persons enrolling in an accredited drug education school established pursuant to this section. That fee must be paid to an official designated for that purpose and at a time and place specified by the area mental health, mental retardation, and substance abuse authority providing the course of instruction in which the person is enrolled. If the clerk of court in the county in which the person is convicted agrees to collect the fees, the clerk shall collect all fees for persons convicted in that county. The clerk shall pay the fees collected to the area mental health, mental retardation and substance abuse authority for the catchment area where the clerk is located regardless of the location where the defendant attends the drug education school and that authority shall distribute the funds in accordance with the rules and regulations of the Department. The fee must be paid in full within two weeks of the date the person is convicted and before he attends any classes, unless the court, upon a showing of reasonable hardship, allows the person additional time to pay the fee or allows him to begin the course of instruction without paying the fee. If the person enrolling in the school demonstrates to the satisfaction of the court that ordered him to enroll in the school that he is unable to pay and his inability to pay is not willful, the court may excuse him from paying the fee. Parents or guardians of persons attending drug education school shall be allowed to audit the drug education school along with their children or wards at no extra expense.

(2) The Department of Human Resources shall have the authority to approve programs to be implemented by area mental health, mental retardation, and substance abuse authorities. Area mental health, mental retardation, and substance abuse authorities may subcontract for the delivery of drug education program services. The Department shall have the authority to approve budgets and contracts with public and private governmental and nongovernmental bodies for the operation of such schools.

(3) Fees collected under this section and retained by the area mental health, mental retardation and substance abuse authority shall be placed in a nonreverting fund. That fund must be used, as necessary, for the operation, evaluation and administration of the drug educational schools; excess funds may only be used to fund other drug or alcohol programs. The area mental health, mental retardation and substance abuse authority shall remit five percent (5%) of each fee collected to the Department of Human Resources on a monthly basis. Fees received by the Department as required by this section may only be used in supporting, evaluating, and administering drug education schools, and any excess funds will revert to the General Fund.

(4) All fees collected by any area mental health, mental retardation and substance abuse authority under the authority of this section may not be used in any manner to match other State funds or be included in any computation for State formula-funded allocations.

(b) Willful failure to pay the fee is one ground for a finding that a person placed on probation or who may make application for expunction of all recordation of his arrest or conviction has not successfully completed the course. If the court determines the person is unable to pay, he shall not be deemed guilty of a willful failure to pay the fee. (1981, c. 922, s. 8.)

Editor's Note. — Session Laws 1981, c. 922, s. 11, makes this section effective Oct. 1, 1981.

§ 90-97. Other penalties.

CASE NOTES

Quoted in *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

§ 90-98. Attempt and conspiracy; penalties.

Effect of Amendments. —

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the bound volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Applied in *State v. Fleming*, 52 N.C. App. 563, 279 S.E.2d 29 (1981).

§ 90-100. Rules and regulations.

The Commission is authorized to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this State. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" near the beginning of the section.

§ 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.

(a) Every person who manufactures, distributes, dispenses or conducts research with any controlled substance within this State or who proposes to engage in the manufacture, distribution, dispensing of, or the conduct of research with any controlled substance within this State, shall obtain annually a registration issued by the North Carolina Department of Human Resources in accordance with rules and regulations promulgated by the Commission.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

- (1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;
- (2) The State courier service operated by the Department of Administration, a common or contract carrier, or a public warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;
- (3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;
- (4) Repealed by Session Laws 1977, c. 891, s. 4.
- (5) Any law-enforcement officer acting within the course and scope of official duties, or any person employed in an official capacity by, or acting as an agent of, any law-enforcement agency or other agency charged with enforcing the provisions of this Article when acting within the course and scope of official duties.

(d) The Commission may, by regulation, waive the requirement for registration of certain classes of manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(f) The North Carolina Department of Human Resources is authorized to inspect the establishment of a registrant, applicant for registration, or practitioner in accordance with rules and regulations promulgated by the Commission.

(h) A physician licensed by the Board of Medical Examiners pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to regulations adopted by the Commission. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781; 1981, c. 51, s. 9; 1983, c. 375, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" throughout the section.

The 1983 amendment, effective May 23, 1983, inserted "The State courier service operated by the Department of Administration" at the beginning of subdivision (c)(2).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applied in *State v. Piland*, 58 N.C. App. 95, 293 S.E.2d 278 (1982).

§ 90-103. Revocation or suspension of registration.

(a) A registration under G.S. 90-102 to manufacture, distribute, or dispense a controlled substance, may be suspended or revoked by the Commission upon a finding that the registrant:

- (1) Has furnished false or fraudulent material information in any application filed under this Article;
- (2) Has been convicted of a felony under any State or federal law relating to any controlled substance; or
- (3) Has had his federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances.

(b) The Commission may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Before denying, suspending, or revoking a registration or refusing a renewal of registration, the Commission shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be refused. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the Commission at a time and place not less than 30 days after the date of service of the order, but in the case of a denial or renewal of registration, the show cause order shall be served not later than 30 days before the expiration of the registration. These proceedings shall be conducted in accordance with rules and regulations of the Commission required by Chapter 150A of the General Statutes, and subject to judicial review as provided in Chapter 150A of the General Statutes. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this Article or any law of the State.

(d) The Commission may suspend, without an order to show cause, any registration simultaneously with the institutions of proceedings under this section, or where renewal of registration is refused if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the Commission or dissolved by a court of competent jurisdiction.

(e) In the event the Commission suspends or revokes a registration granted under G.S. 90-102, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may in the discretion of the Commission be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances may be ordered forfeited to the State.

(1971, c. 919, s. 1; 1973, c. 1331, s. 3; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" throughout the section.

§ 90-104. Records of registrants or practitioners.

Each registrant or practitioner manufacturing, distributing, or dispensing controlled substances under this Article shall keep records and maintain inventories in conformance with the record-keeping and the inventory requirements of the federal law and shall conform to such rules and regulations as may be promulgated by the Commission. (1971, c. 919, s. 1; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" at the end of the section.

§ 90-106. Prescriptions and labeling.

(b) In emergency situations, as defined by rule of the Commission, Schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the dispensing agent. Prescriptions shall be retained in conformity with the requirements of G.S. 90-104. No prescription for a Schedule II substance may be refilled.

(f) No controlled substance shall be dispensed or distributed in this State unless such substance shall be in a container clearly labeled in accord with regulations lawfully adopted and published by the federal government or the Commission. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1975, c. 572; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Section 90-70, referred to in this section, along with certain other sections from Parts 1 and 1A of Article 4 of Chapter 90, has been recodified in Article 4A of Chapter 90. As to the preservation of prescription orders,

see now § 90-85.26. As to the availability of pharmacy records, see now § 90-85.36.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" in the first sentence of subsection (b) and at the end of subsection (f).

§ 90-108. Prohibited acts; penalties.

(a) It shall be unlawful for any person:

- (1) Other than practitioners licensed under Articles 1, 2, 4, 6, 11, 12 of this Chapter to represent to any registrant or practitioner who manufactures, distributes, or dispenses a controlled substance under the provision of this Article that he is a licensed practitioner in order to secure or attempt to secure any controlled substance as defined in this Article or to in any way impersonate a practitioner for the purpose of securing or attempting to secure any drug requiring a prescription from a practitioner as listed above and who is licensed by this State;
- (2) Who is subject to the requirements of G.S. 90-101 or a practitioner to distribute or dispense a controlled substance in violation of G.S. 90-105 or 90-106;
- (3) Who is a registrant to manufacture, distribute, or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;
- (4) To omit, remove, alter, or obliterate a symbol required by the Federal Controlled Substances Act or its successor;
- (5) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice or information required under this Article;

- (6) To refuse any entry into any premises or inspection authorized by this Article;
- (7) To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article;
- (8) Who is a registrant or a practitioner to distribute a controlled substance included in Schedule I or II of this Article in the course of his legitimate business, except pursuant to an order form as required by G.S. 90-105;
- (9) To use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;
- (10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;
- (11) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this Article, or any record required to be kept by this Article;
- (12) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit controlled substance;
- (13) To obtain controlled substances through the use of legal prescriptions which have been obtained by the knowing and willful misrepresentation to or by the intentional withholding of information from one or more practitioners;
- (14) Who is an employee of a registrant or practitioner and who is authorized to possess controlled substances or has access to controlled substances by virtue of his employment, to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use or to take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or divert to his own use or other unauthorized or illegal use any controlled substance which shall have come into his possession or under his care.

(b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony. (1971, c. 919, s. 1; 1973, c. 1358, s. 11; 1979, c. 760, s. 5; 1983, c. 294, s. 7; c. 773.)

Editor's Note. —

This section, as set out above, consists of the second version of this section in the bound volume, as subsequently amended.

The amendment in Session Laws 1979, c. 760, s. 5, incorporated in the second version of this section in the bound volume, became effective July 1, 1981, pursuant to Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides:

"This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Effect of Amendments. —

The first 1983 amendment, effective May 11, 1983, substituted "criminal pleading" for "violation is prosecuted by an information, indictment, or warrant which" in subsection (b).

The second 1983 amendment, effective Aug. 1, 1983, added subdivisions (13) and (14) of subsection (a).

CASE NOTES

Presumption of Forgery. — When a defendant in possession of a forged prescription for narcotics endeavors to obtain narcotics with it in violation of this section, a presumption arises that he either forged the prescription or had knowledge that it was a forgery. *State v. Fleming*, 52 N.C. App. 563, 279 S.E.2d 29 (1981).

Pharmacist's Knowledge of Invalidity of Forged Prescription. — In a prosecution of defendant for feloniously and intentionally acquiring possession of a controlled substance in violation of subdivision (a)(10) of this section, there was no merit to defendant's contention that, since the pharmacist knew the prescrip-

tion presented by defendant was invalid before filling it, defendant did not violate the section, since the section prohibits the possession of a controlled substance by "misrepresentation, fraud, forgery, deception or subterfuge"; and, according to the evidence, defendant obtained possession of the controlled substance through the use of a forged prescription. *State v. Lee*, 51 N.C. App. 344, 276 S.E.2d 501, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Quoted in *State v. Myrick*, — N.C. App. —, 299 S.E.2d 439 (1983).

Cited in *State v. Cooper*, 304 N.C. 701, 286 S.E.2d 102 (1982).

§ 90-109. (Effective until July 1, 1984) Nonprofessional treatment.

(a) Any person other than a practitioner, who holds himself out to the public, or any part of it, as being a drug treatment facility, or being able or available to treat, give shelter or comfort to, including telephone crisis services (hotlines), or who proposes to do any of the foregoing to or for any person using, under the influence of, or experiencing the effects of a controlled substance, included in Schedules I through VI of this Article shall first be licensed by the North Carolina Department of Human Resources as a drug treatment facility in accordance with rules and regulations adopted by the Commission.

(c) The North Carolina Department of Human Resources shall not issue a drug treatment facility license to an applicant until it shall satisfy itself that professional and competent medical services are at all times available to the applicant at the drug treatment facility, that a responsible adult will be present or immediately available to the applicant at all times at the drug treatment facility, and that the applicant will make a positive contribution toward controlling drug dependence and assisting drug dependent persons. The North Carolina Department of Human Resources may deny license applications of proposed or existing drug treatment facilities if it finds there are reasonable grounds for belief that issuance of the license would be inconsistent with the safety of the public or with the application of law. A decision of the North Carolina Department of Human Resources to deny or revoke a drug treatment facility license may be appealed to the Commission in accordance with rules and regulations adopted by the Commission.

(1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3; 1981, c. 51, s. 9.)

Section Set Out Twice. — The section above is effective until July 1, 1984. For this section as amended effective July 1, 1984, see the following section, also numbered 90-109.

Only Part of Section Set Out. — As the rest of the section was not affected by the amend-

ment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Commission" at the end of subsection (a), and near the middle of the last sentence of subsection (c).

§ 90-109. (Effective July 1, 1984) Licensing required.

A facility for drug treatment as defined in G.S. 122-23.2 shall obtain the license required by Article 1A of Chapter 122 of the General Statutes permitting operation. Subject to rules governing the operation and licensing of these facilities set by the Commission for Mental Health, Mental Retardation, and Substance Abuse Services, the Department of Human Resources shall be responsible for issuing licenses. These licensing rules shall be consistent with the licensing rules adopted under Article 1A of Chapter 122 of the General Statutes. (1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1983, c. 718, s. 2.)

Section Set Out Twice. — The section above is effective July 1, 1984. For this section as in effect until July 1, 1984, see the preceding section, also numbered 90-109.

Editor's Note. — Session Laws 1983, c. 718,

s. 6, contains a severability clause.

Effect of Amendments. — The 1983 amendment, effective July 1, 1984, rewrote this section.

§ 90-112. Forfeitures.

(a) The following shall be subject to forfeiture:

- (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;
- (2) All money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article;
- (3) All property which is used, or intended for use, as a container for property described in subdivisions (1) and (2);
- (4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2), except that
 - a. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this Article unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this Article;
 - b. No conveyance shall be forfeited under the provisions of this section by reason of any act or omission, committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;
 - c. No conveyance shall be forfeited unless the violation involved is a felony under this Article;
 - d. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who had no knowledge of or consented to the act or omission.
- (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Article.

(d1) Notwithstanding the provisions of subsection (d), the law-enforcement agency having custody of money that is forfeited pursuant to this section shall pay it to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which the money was seized.

(f) All other property subject to forfeiture under the provisions of this Article shall be forfeited as in the case of conveyances used to conceal, convey, or transport intoxicating beverages. (1971, c. 919, s. 1; 1973, cc. 447, 542; c. 1446, s. 6; 1983, c. 528, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, rewrote subdivision (a)(2), which read "All raw material, products, and equipment of any kind which are

used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of the provisions of this Article," added subsection (d1), and in subsection (f) substituted "other property" for "conveyances" following "all."

CASE NOTES

When Order of Seizure Must Be Applied For. — The plain effect of subsection (b) of this section is to circumscribe the authority of law-enforcement officers to seize vehicles unless they first obtain "process" from a neutral judicial officer. There is, however, no requirement in this section that the officers must apply for an order of seizure immediately after they have observed the prescribed criminal activity. *State v. Hall*, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Time Within Which Vehicle May Be Seized. — This section does not restrict the time within which a vehicle may be seized after a violation of the controlled substances law has been observed. *State v. Hall*, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

To fix a definite time within which officers must act to seize a vehicle after they have seen an illegal drug transaction might hinder seriously the effectiveness of large scale undercover drug investigations in which the officers are trying to find the big drug dealers through various smaller operators. If a vehicle must be seized immediately, or very soon after the commission of a crime, it is likely that the

detective's cover would be destroyed, resulting in increased danger to that officer if he continues to work in the investigation or, if he must then drop out of the operation, the waste of his special efforts, requiring much training and planning, whereby he was enabled to make effective contact with those involved in illegal drug trafficking. Thus, though a situation may arise where the length of time, elapsing between the commission of a crime and the later issuance of an order of seizure, is too unreasonable to be sustained, where process was served within a month after the officer saw a violation occur, the length of time was not unreasonable. *State v. Hall*, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Scope of Search of Impounded Vehicle. — A search by police officers of a closed medicine bottle found in defendant's car exceeded the permissible scope of a valid inventory search of a lawfully impounded vehicle. *State v. Hall*, 52 N.C. App. 492, 279 S.E.2d 111, appeal dismissed and cert. denied, 304 N.C. 198, 285 S.E.2d 104 (1981).

Cited in *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

CASE NOTES

Forfeiture may be defeated if claimant can show the illegal use occurred without his knowledge or consent. *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Burden is on the claimant to prove to the fact-finder "that he had no knowledge, or reason to believe, that [the vehicle] was being or would be used in the violation of laws of this

State relating to controlled substances..." *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Claimant has right to have a jury pass upon his claim. *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

Claimant is entitled to have fact-finder, whether court or jury, determine the essen-

tial issue in a forfeiture proceeding, namely: Was his vehicle being used illegally to transport controlled substances without his

knowledge or consent? *State v. Meyers*, 45 N.C. App. 672, 263 S.E.2d 835 (1980).

§ 90-113.1. Burden of proof; liabilities.

CASE NOTES

Placing the burden of proving an exemption or exception on person claiming its benefit does not run afoul of constitutional standards, and the burden of proving that defendant possessed or sold and delivered a controlled substance is not shifted away from the State. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

Exemption Through Authorization. —

One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances but proof of such exemption through authorization must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied and appeal dismissed, 301 N.C. 102, 273 S.E.2d 306 (1980), 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ 90-113.2. Judicial review.

All final determinations, findings, and conclusions of the Commission under this Article shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such decision may obtain review of the decision as provided in Chapter 105A of the General Statutes. Findings of fact by the Commission, if supported by substantial evidence, shall be conclusive. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1331, s. 3; 1977, c. 667, s. 3; c. 891, s. 5; 1981, c. 51, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Com-

mission" for "North Carolina Drug Commission" in the first and second sentences.

§ 90-113.3. Education and research.

(c) The North Carolina Department of Human Resources is authorized and directed to encourage research on misuse and abuse of controlled substances. In connection with such research and in furtherance of the enforcement of this Article, it is authorized to:

- (1) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse;
- (2) Make studies and undertake programs of research to:
 - a. Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this Article;
 - b. Determine patterns of misuse and abuse of controlled substances and the social effect thereof; and
 - c. Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances.
- (3) Enter into contracts with other public agencies, any district attorney, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(1971, c. 919, s. 1; c. 1244, s. 14; 1973, c. 476, s. 128; 1977, c. 667, s. 3; 1981, c. 218.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment inserted "any district attorney" in subdivision (c)(3).

CASE NOTES

Defendant Must Prove Exemption Through Authorization. — One may be exempt from State prosecution for the possession or the sale or delivery of controlled substances if that person is authorized by the North Carolina Controlled Substances Act to so possess or sell or deliver such substances but

proof of such exemption through authorization must be provided by the defendant. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

§ 90-113.4: Repealed by Session Laws 1981, c. 500, s. 2, effective October 1, 1981.

Editor's Note. — Session Laws 1981, c. 500, s. 4, provides that the act becomes effective October 1, 1981, and applies to acts committed on or after that date.

Session Laws 1981, c. 500, s. 3, contains a severability clause.

ARTICLE 5A.

North Carolina Toxic Vapors Act.

§ 90-113.9. Definitions.

For purposes of this Article, unless the context requires otherwise,

- (2) "Commission" means the Commission for Mental Health, Mental Retardation and Substance Abuse Services, established under Part 4 of Article 3 of Chapter 143B of the General Statutes. (1971, c. 1208, s. 1; 1979, c. 671, s. 1; 1981, c. 51, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, added subdivision (2).

§ 90-113.14. Conditional discharge and expunction of records for first offenses.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A or 5B of Chapter 90 pleads guilty to or is found guilty of inhaling or possessing any substance having the property of releasing toxic vapors or fumes in violation of Article 5A of Chapter 90, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms

and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions. Discharge and dismissal under this section or G.S. 90-96 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge or dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, the "North Carolina Controlled Substances Act", Article 5, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-113.10 or 90-113.11 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

- (1) There is no drug education school within a reasonable distance of the defendant's residence; or
- (2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subsection (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purpose of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program suc-

cessfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Commission, the names of all persons convicted under such Articles, together with the offense or offenses of which such persons were convicted. The clerk shall also file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Court shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5 or 5A has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21 upon dismissal by the State of the charges against him or upon entry of a nolle prosequi or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment, or information, and trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment, or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been cancelled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited by G.S. 90-113.21, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the misdemeanor in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before such arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been cancelled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been cancelled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 1078; 1975, c. 650, ss. 3, 4; 1977, c. 642, s. 3; 1979, c. 431, ss. 3, 4; 1981, c. 51, s. 11; c. 922, ss. 5-7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, substituted "Commission" for "North Carolina Drug Authority" in the first sentence of subsection (c).

The second 1981 amendment rewrote subsection (a), added subsection (a1), and added sub-

sections (d) and (e). The amendments in subsections (d) and (e) are effective October 1, 1981, while the amendments in subsections (a) and (a1) are effective upon ratification. The act was ratified July 10, 1981. Session Laws 1981, c. 922, s. 7, purported to amend § 90-13.14, but the amendment was made to this section since § 90-113.14 was obviously the intended reference.

§§ 90-113.15 to 90-113.19: Reserved for future codification purposes.

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.20. Title.

This Article shall be known and may be cited as the "North Carolina Drug Paraphernalia Act." (1981, c. 500, s. 1.)

Editor's Note. — Session Laws 1981, c. 500, s. 4, provides that this Article becomes effective October 1, 1981, and applies to acts committed on or after that date.

Session Laws 1981, c. 500, s. 3, contains a severability clause.

Legal Periodicals. — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

§ 90-113.21. General provisions.

(a) As used in this Article, "drug paraphernalia" means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and injecting, ingesting, inhaling, or otherwise introducing controlled substances into the human body. "Drug paraphernalia" includes, but is not limited to, the following:

- (1) Kits for planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;
- (2) Kits for manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
- (3) Isomerization devices for increasing the potency of any species of plant which is a controlled substance;
- (4) Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of controlled substances;
- (5) Scales and balances for weighing or measuring controlled substances;
- (6) Diluents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose, and lactose for mixing with controlled substances;
- (7) Separation gins and sifters for removing twigs and seeds from, or otherwise cleaning or refining, marijuana;
- (8) Blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances;
- (9) Capsules, balloons, envelopes and other containers for packaging small quantities of controlled substances;
- (10) Containers and other objects for storing or concealing controlled substances;
- (11) Hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body;
- (12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body, such as:
 - a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

- b. Water pipes;
- c. Carburetion tubes and devices;
- d. Smoking and carburetion masks;
- e. Objects, commonly called roach clips, for holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
- f. Miniature cocaine spoons and cocaine vials;
- g. Chamber pipes;
- h. Carburetor pipes;
- i. Electric pipes;
- j. Air-driven pipes;
- k. Chillums;
- l. Bongs;
- m. Ice pipes or chillers.

(b) The following, along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia:

- (1) Statements by the owner or anyone in control of the object concerning its use;
- (2) Prior convictions of the owner or other person in control of the object for violations of controlled substances law;
- (3) The proximity of the object to a violation of the Controlled Substances Act;
- (4) The proximity of the object to a controlled substance;
- (5) The existence of any residue of a controlled substance on the object;
- (6) The proximity of the object to other drug paraphernalia;
- (7) Instructions provided with the object concerning its use;
- (8) Descriptive materials accompanying the object explaining or depicting its use;
- (9) Advertising concerning its use;
- (10) The manner in which the object is displayed for sale;
- (11) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a seller of tobacco products or agricultural supplies;
- (12) Possible legitimate uses of the object in the community;
- (13) Expert testimony concerning its use;
- (14) The intent of the owner or other person in control of the object to deliver it to persons whom he knows or reasonably should know intend to use the object to facilitate violations of the Controlled Substances Act. (1981, c. 500, s. 1.)

§ 90-113.22. Possession of drug paraphernalia.

(a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repack, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars (\$500.00), imprisonment for not more than one year, or both. (1981, c. 500, s. 1.)

§ 90-113.23. Manufacture or delivery of drug paraphernalia.

(a) It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia knowing that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repack, store, contain, or conceal a controlled substance which it would be unlawful to possess, or that it will be used to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

(b) Delivery, possession with intent to deliver, or manufacture with intent to deliver, of each separate and distinct item of drug paraphernalia is a separate offense.

(c) Violation of this section is a misdemeanor punishable by a fine of not less than one thousand dollars (\$1,000), imprisonment for not more than two years, or both. However, delivery of drug paraphernalia by a person over 18 years of age to someone under 18 years of age who is at least three years younger than the defendant shall be punishable as a Class I felony. (1981, c. 500, s. 1; c. 903, s. 1.)

Effect of Amendments. — The 1981 amendment added the second sentence in subsection (c).

§ 90-113.24. Advertisement of drug paraphernalia.

(a) It is unlawful for any person to purchase or otherwise procure an advertisement in any newspaper, magazine, handbill, or other publication, or purchase or otherwise procure an advertisement on a billboard, sign, or other outdoor display, when he knows that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia described in this Article.

(b) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars (\$500.00), imprisonment for not more than six months, or both. (1981, c. 500, s. 1; c. 903, s. 1.)

Effect of Amendments. — The 1981 amendment deleted a former second sentence of subsection (b) making the delivery of drug paraphernalia to minors a felony.

ARTICLE 6.

Optometry.

Repeal of Article. —

Session Laws 1981, c. 496, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-114. Optometry defined.**CASE NOTES**

The physician-patient privilege against disclosure of confidential communications and information does not extend to optometrists.

State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

§ 90-116. Board of Examiners in Optometry.

In order to properly regulate the practice of optometry, there is established a North Carolina State Board of Examiners in Optometry, which shall consist of five regularly graduated optometrists who have been engaged in the practice of optometry in this State for at least five years and two members to represent the public at large.

No public member shall at any time be a health care provider, be related to or be the spouse of a health care provider, or have any pecuniary interest in the profitability of a health care provider. For purposes of this section, the term "health care provider" shall have the same meaning as provided in G.S. 58-254.20(4). The Governor shall appoint the two public members not later than July 1, 1981.

The optometric members of the Board shall be appointed by the Governor from a list provided by the North Carolina State Optometric Society. For each vacancy, the society must submit at least three names to the Governor. The society shall establish procedures for the nomination and election of optometrist members of the Board. These procedures shall be adopted under the rule-making procedures described in Article 2, Chapter 150A of the General Statutes, and notice of the proposed procedures shall be given to all licensed optometrists residing in North Carolina. Such procedures shall not conflict with the provisions of this section. Every optometrist with a current North Carolina license residing in the State shall be eligible to vote in all such elections, and the list of licensed optometrists shall constitute the registration list for elections. Any decision of the society relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the society has rendered the decision in controversy, and all such cases shall be heard de novo.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is chosen and qualifies.

The Governor may remove any member for good cause shown. Any vacancy in the optometrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least three names submitted by the North Carolina State Optometric Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C. S., s. 6689; 1935, c. 63; 1981, c. 496, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section.

§ 90-117.1. Quorum; adjourned meetings.

A majority of the members of said Board shall constitute a quorum for the transaction of business. If a majority of members are not present at the time and the place appointed for a Board meeting, those members of the Board in

attendance may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1973, c. 800, s. 2; 1981, c. 496, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "A majority of the members" for "Three members" at the beginning of the first sentence, deleted "and at any meeting of the Board" at the end of the first sentence, sub-

stituted "a majority of members" for "three members" near the beginning of the second sentence, and substituted "a board" for "the" and "in attendance" for "present" in the second sentence.

§ 90-117.3. Annual and special meetings.

The North Carolina State Board of Examiners in Optometry shall meet annually in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by a majority of the members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1973, c. 800, s. 4; 1981, c. 496, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "any three" for "a majority of the" near the end of the first sentence.

§ 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.

(b) The applicant shall be of good moral character and at least 18 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character; has an academic education, the standard of which shall be determined by the said Board; and that he is a graduate of and has a diploma from an accredited optometric college or the optometric department of an accredited university or college recognized and approved as such by the said Board.

(1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C. S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357; 1959, c. 464; 1973, c. 800, s. 7; 1975, c. 19, s. 23; 1977, c. 482, s. 2; 1981, c. 496, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in subsection (b) inserted "and" near the

middle of the first sentence, substituted "18" for "21" in the first sentence, inserted "and" preceding "that he is" in the second sentence, and made minor punctuation changes.

§ 90-118.2. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice optometry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Examiners in Optometry or to its authorized agents.

A licensee who practices in more than one office location shall make application to the Board for a duplicate license for each branch office for display as required by this section. In issuing a duplicate license, the address of the branch office location and the original certificate number shall be included. At the time of the annual renewal of licenses, those optometrists who have been issued a duplicate license for a branch office, shall make application to the North Carolina Board of Examiners in Optometry on a form provided by the Board for the renewal of the license in the same manner as provided for in G.S. 90-118.10 for the renewal of his license. The holder of a certificate for a branch office may cancel it by returning the certificate to the Secretary of the Board. (1973, c. 800, s. 9; 1981, c. 811, s. 1.)

Cross References. — As to duplicate license fees for branch offices, see § 90-123.

Effect of Amendments. — The 1981 amendment added the second paragraph.

§ 90-118.3. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, or for violation of any of the terms or provisions of G.S. 90-121.2, the North Carolina State Board of Examiners in Optometry may refuse to issue a certificate of renewal of license. (1973, c. 800, s. 10; 1981, c. 811, s. 2.)

Effect of Amendments. — The 1981 amendment deleted a former second sentence, which read: "As used herein the term 'license' shall

include license, provisional license or intern permit."

§ 90-118.5. Licensing practitioners of other states.

(a) If an applicant for licensure is already licensed in another state in optometry, the North Carolina State Board of Examiners in Optometry shall issue a license to practice optometry to the applicant without examination other than a clinical practicum examination upon evidence that:

- (1) The applicant is currently an active, competent practitioner in good standing, and
- (2) The applicant has practiced at least three out of the five years immediately preceding his or her application, and
- (3) The applicant currently holds a valid license in another state, and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State, and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

(b) Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the optometry board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice optometry in that state, and for a period of at least three out of five years immediately preceding the application has engaged in the practice of optometry; is of good moral character and that

during the period of his practice no charges have been filed with said board against the applicant for the violation of the criminal laws of the state or the United States, or for the violation of the ethics of the profession of optometry. (1973, c. 800, s. 12; 1981, c. 496, ss. 6, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment rewrote subsection (a), and substituted "at least three out of five" for "five" near the middle of subsection (b).

§ 90-118.8: Repealed by Session Laws 1981, c. 811, s. 4.

Editor's Note. — The repealed section was amended by Session Laws 1981, c. 496, s. 8.

§ 90-118.9: Repealed by Session Laws 1981, c. 811, s. 5.

Editor's Note. — The repealed section was amended by Session Laws 1981, c. 496, s. 9.

§ 90-118.11. Unauthorized practice; penalty for violation of Article.

If any person shall practice or attempt to practice optometry in this State without first having passed the examination and obtained a license from the North Carolina State Board of Examiners in Optometry; or without having obtained a provisional license from said Board; or if he shall practice optometry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-118.10; or shall practice or attempt to practice optometry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall practice or attempt to practice optometry by means or methods that the Board has determined is beyond the scope of the person's educational training; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice, or attempt to practice, optometry in violation of the provisions of this Article; or shall practice optometry under any name other than his own name, said person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or imprisonment, or both, in the discretion of the court. Each day's violation of this Article shall constitute a separate offense. (1973, c. 800, s. 18; 1977, c. 482, s. 4; 1981, c. 496, s. 10.)

Effect of Amendments. — The 1981 amendment substituted the present section heading

for one which read: "Unauthorized practice; penalty."

§ 90-121.1. Board may enjoin illegal practices.

In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Examiners in Optometry may, if it shall find that any person is violating any of the provisions of this Article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court shall issue an order restraining any further

violating thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of the Chapter on "Civil Procedure" [Chapter 1]: provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of G.S. 90-124. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business. (1973, c. 800, s. 19; 1981, c. 496, s. 11.)

Effect of Amendments. — The 1981 amendment added the last sentence.

§ 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.

(a) The Board shall have the power to make, adopt, and promulgate such rules and regulations, including rules of ethics, as may be necessary and proper for the regulation of the practice of the profession of optometry and for the performance of its duties. The Board shall have jurisdiction and power to hear and determine all complaints, allegations, charges of malpractice, corrupt or unprofessional conduct, and of the violation of the rules and regulations, including rules of ethics, made against any optometrist licensed to practice in North Carolina. The Board shall also have the power and authority to: (i) refuse to issue a license to practice optometry; (ii) refuse to issue a certificate of renewal of a license to practice optometry; (iii) revoke or suspend a license to practice optometry; and (iv) invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice optometry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any State or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice optometry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice optometry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
- (8) Repealed by Session Laws 1981, c. 496, s. 12.
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of optometry or in attempting to fraudulently obtain a license to practice optometry;

- (10) Has engaged in such immoral conduct as to discredit the optometry profession;
 - (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
 - (12) Has been negligent in the practice of optometry;
 - (13) Has employed a person not licensed in this State to do or perform any act of service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article can lawfully be done or performed only by an optometrist licensed in this State;
 - (14) Is incompetent in the practice of optometry;
 - (15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients, including false or misleading advertising;
 - (16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
 - (17) Has committed any fraudulent or misleading acts in the practice of optometry;
 - (18) Repealed by Session Laws 1981, c. 496, s. 12.
 - (19) Has, in the practice of optometry, committed an act or acts constituting malpractice;
 - (20) Repealed by Session Laws 1981, c. 496, s. 12.
 - (21) Has permitted an optometric assistant in his employ or under his supervision to do or perform any act or acts violative to this Article or of the rules and regulations promulgated by the Board;
 - (22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of optometry;
 - (23) Has persistently maintained, in the practice of optometry, unsanitary offices, practices, or techniques;
 - (24) Is a menace to the public health by reason of having a serious communicable disease;
 - (25) Has engaged in any unprofessional conduct as the same may be from time to time defined by the rules and regulations of the Board.
- (1973, c. 800, s. 20; 1981, c. 496, ss. 12, 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment inserted "including false or misleading advertising" at the end of subdivision (a)(15),

and deleted subdivisions (8), (18) and (20) of subsection (a), which prohibited the solicitation of professional patronage and the sale or advertisement of any product or services by an optometrist.

§ 90-123. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Examiners in Optometry, said Board is hereby authorized to charge and collect fees established by its rules and regulations not exceeding the following:

- (10) Each duplicate license fee for each branch office 25.00
 (1909, c. 444, s. 12; C. S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2; 1981, c. 909.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added subdivision (10).

§ 90-123.1. Continuing education courses required.

All registered optometrists now or hereafter licensed in the State of North Carolina are and shall be required to take annual courses of study in subjects relating to the practice of the profession of optometry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form approved by the Board and shall be submitted by each registered optometrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to use up to one half of its annual renewal fees for the purposes of contracting with institutions of higher learning, professional organizations, or qualified individuals for the providing of educational programs that meet this requirement. The Board is further authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. In no instance may the Board require a greater number of hours of study than are available at approved courses held within the State, and shall be allowed to waive this requirement in cases of certified illness or undue hardship. (1969, c. 354; 1981, c. 811, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "approved" for "provided" near the middle of the fourth sentence.

§ 90-127.3. Copy of prescription furnished on request.

All persons licensed or registered under this Chapter shall upon request give each patient having received an eye examination a copy of his spectacle prescription. No person, firm or corporation licensed or registered under Article 17 of this Chapter shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. The prescriber shall state the expiration date on the face of every prescription, and the expiration date shall be no earlier than 365 days after the examination date.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled. (1981, c. 496, s. 14.)

Editor's Note. — Session Laws 1981, c. 496, s. 16, makes this section effective July 1, 1981.

ARTICLE 7.

Osteopathy.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 1, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-130. Board of Examiners; membership; officers; meeting.

There shall be a State Board of Osteopathic Examination and Registration consisting of three members appointed by the Governor, whose duty it shall be to administer the provisions of this Article. The members of the Board shall be reputable practitioners of osteopathy and appointed by the Governor from a list provided by the North Carolina Osteopathic Society. For each vacancy, the Society must submit at least three names to the Governor, the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession. Their term of office shall be for three years and so designated by the Governor that the term of one member shall expire each year. Thereafter annually the Governor shall in like manner appoint one person to fill the vacancy in the Board thus created.

All Board members serving on June 30, 1983, shall be eligible to complete their respective terms. In order to reduce the membership of the Board from five to three, the Governor shall make no appointments to fill the first two vacancies occurring on the Board after June 30, 1983. A vacancy occurring from any other cause shall be filled by the Governor for the unexpired term in the same manner as stated above.

The Board shall meet annually and elect a president, secretary, and treasurer, each to serve one year. The Board shall have a common seal, and shall adopt rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet annually upon the call of the president. Two members of the Board shall constitute a quorum, and no certificate to practice osteopathy shall be granted on an affirmative vote of less than two. The Board shall keep a record of its proceedings and a register of all applicants for certificates giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C. S., s. 6701; 1937, c. 301, s. 1; 1981, c. 884, s. 8; 1983, c. 107, s. 1.)

Effect of Amendments. — The 1981 amendment deleted a provision requiring the treasurer and secretary each to give bond.

The 1983 amendment, effective July 1, 1983, rewrote this section.

§ 90-132. When examination dispensed with; temporary permit; annual registration.

The Board may, in its discretion, dispense with an examination in the case of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this State or who presents a certificate issued by the National Board of Examiners for Osteopathic Physicians and Surgeons, and who makes application on a form to be prescribed by the Board, accompanied by a fee of seventy-five dollars (\$75.00).

The secretary of the Board may grant a temporary permit until a regular meeting of the Board, or to such time as the Board can conveniently meet, to one whom he considers eligible to practice in the State, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the Board can be taken. In all the above cases the fee shall be the same as charged to applicants for examination.

Every person licensed to practice osteopathy by the Board of Osteopathic Examination and Registration shall, during January of each year, register his name, office and residence addresses, and such other information as the Board may deem necessary with the Board secretary and shall pay a registration fee fixed by the Board not exceeding fifty dollars (\$50.00). An annual registration receipt shall be issued and mailed to each license holder, upon payment of the registration fee, which shall be placed in a conspicuous position in the licensee's office, if he practices in this State. In the event an osteopath fails to register as herein provided he shall pay an additional amount of ten dollars (\$10.00) to the Board. Should an osteopath fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such osteopath may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, the license of such osteopath shall be reinstated. (1907, c. 764, s. 2; C.S., s. 6703; 1959, c. 705, s. 2; 1983, c. 107, s. 2.)

Effect of Amendments. — The 1983 amendment, effective July 1, 1983, rewrote the third paragraph.

ARTICLE 8.

Chiropractic.

Repeal of Article. —

Session Laws 1981, c. 766, s. 9, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions

repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-139. Creation and membership of Board of Examiners.

(a) The State Board of Chiropractic Examiners is created to consist of seven members appointed by the Governor, and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President of the Senate and the Speaker of the House of Representatives. No more than three members of the Board may be graduates of the same college or school of chiropractic. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is chosen and qualifies. The initial appointment of the General Assembly upon the recommendation of the President of the Senate shall be for a term to expire June 30, 1986, and the initial appointment of the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for a term to expire June 30, 1985, subsequent appointments upon the recommendation of the President of the Senate shall be for terms of three years, subsequent appointments upon the recommendation of the Speaker of the House of Representatives shall be for terms of two years.

(c) The Governor and General Assembly, respectively, may remove any member appointed by them for good cause shown. In addition, upon the request of the Speaker of the House of Representatives or the President of the Senate concerning a person appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives or the President of the Senate, respectively, the Governor may remove such appointee for good cause shown, if the request is made and removal occurs either (i) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment, or (ii) after sine die adjournment of the regular session. The Governor may appoint persons to fill vacancies of persons appointed by him to fill unexpired terms. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122. (1917, c. 73, s. 1; C. S., s. 6710; 1979, c. 108, s. 1; 1981, c. 766, s. 1; 1983, c. 717, ss. 100-104.)

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section.

The 1983 amendment, effective July 11,

1983, substituted "and General Assembly" for "Lieutenant Governor and Speaker of the House" at the end of the first sentence of subsection (a), substituted "and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President of the Senate and the Speaker of the House of

Representatives" for "and one each by the Lieutenant Governor and the Speaker of the House" at the end of the second sentence of subsection (a), substituted "two complete consecutive

terms" for "two complete consecutive three-year terms" in the second sentence of subsection (b), rewrote the third sentence of subsection (b), and rewrote subsection (c).

§ 90-140. Selection of chiropractic members of Board.

The Governor and the General Assembly upon the recommendation of the President of the Senate shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board, and the General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint a chiropractic member of the Board for a term of two years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, Lieutenant Governor and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2 of Chapter 150A of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C. S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2; 1981, c. 766, s. 2; 1983, c. 717, s. 106.)

Editor's Note. —

Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section.

The 1983 amendment, effective July 11, 1983, rewrote the first sentence of this section, which read "The Governor, Lieutenant Governor and Speaker of the House shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board."

§ 90-141. Organization; quorum.

The Board of Chiropractic Examiners shall elect such officers as they may deem necessary. Four members of the Board shall constitute a quorum for the transaction of business. (1917, c. 73, s. 4; C. S., s. 6713; 1933, c. 442, s. 1; 1981, c. 766, s. 3.)

Effect of Amendments. — The 1981 amendment deleted a provision concerning the filling

of vacancies at the end of the first sentence, and added the second sentence.

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for license to practice

chiropractic every applicant who complies with the following provisions: He shall, before he is admitted to examination, furnish proof of good moral character and satisfy the Board that he has completed two years of prechiropractic college education and received credits for a minimum of 60 semester hours. He shall exhibit a diploma or furnish proof of graduation from a chiropractic college accredited by the Council on Chiropractic Education or holding recognized candidate for accreditation status with the Council on Chiropractic Education or a college teaching chiropractic that, in the Board's opinion, meets the equivalent standards established by the Council on Chiropractic Education, requiring an attendance of not less than four academic years, and supplying such facilities for clinical and scientific instruction, as shall meet the approval of the Board. The examination shall include but not be limited to the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C. S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1; 1981, c. 766, s. 4.)

Effect of Amendments. — The 1981 amendment deleted a former second paragraph concerning the educational requirements for those chiropractics licensed by reciprocity.

§ 90-143.1. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice chiropractic, the Board shall issue a license to practice chiropractic to the applicant upon evidence that:

- (1) The applicant is currently an active, competent practitioner and is in good standing; and
- (2) The applicant has practiced at least one year out of the three years immediately preceding his or her application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State.

Any license issued upon the application of any chiropractor from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the State Board of Chiropractic Examiners upon examination, and the rights and privileges to practice the profession of chiropractic under any license so issued shall be subject to the same duties, obligations, restrictions, and conditions as imposed by this Article on chiropractors originally examined by the State Board of Chiropractic Examiners. (1981, c. 766, s. 5.)

§ 90-145. Grant of license.

The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. (1917, c. 73, s. 7; C. S., s. 6717; 1949, c. 785, s. 2; 1981, c. 766, s. 6.)

Effect of Amendments. — The 1981 amendment substituted the present section heading for one which read: "Grant of license; temporary

license," and deleted a former second sentence concerning the granting of temporary licenses.

§ 90-153. Licensed chiropractors may practice in public hospitals.

OPINIONS OF ATTORNEY GENERAL

Chiropractor May Review, etc. —

The correct citation to the opinion of the

Attorney General cited under this catchline in the bound volume is 48 N.C.A.G. 32.

§ 90-154. Grounds for professional discipline.

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

- (1) Permanently revoke a license to practice chiropractic;
- (2) Suspend a license to practice chiropractic;
- (3) Refuse to grant a license;
- (4) Censure a practitioner;
- (5) Issue a letter of reprimand;
- (6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) The following are grounds for disciplinary action by the Board under subsection (a):

- (1) Advertising services in a false or misleading manner;
- (2) Conviction of a felony or of a crime involving moral turpitude;
- (3) Addition or severe dependency upon alcohol or other drugs which endangers the public by impairing a chiropractor's ability to practice safely;
- (4) Unethical conduct in the practice of the profession as defined by rule or regulation of the Board;
- (5) Negligence or incompetence in the practice of chiropractic;
- (6) Committing an act or acts constituting malpractice in the practice of chiropractic;
- (7) Rendering unacceptable care according to explicit standards adopted by the Board of Chiropractic Examiners;
- (8) Engaging in a course of lewd or immoral conduct in connection with the delivery of chiropractic services to a patient. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-156. Pay of Board and authorized expenditures.

The members of the Board of Chiropractic Examiners shall receive their actual expenses, including transportation and lodging, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this Article, such expenses to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C. S., s. 6727; 1949, c. 785, s. 4; 1981, c. 766, s. 8.)

Effect of Amendments. — The 1981 amendment substituted "transportation and lodging"

for "railroad fare and hotel bills" near the beginning of the first sentence.

§ 90-157.2. Chiropractor as expert witness.

CASE NOTES

Stated in *Mitchem v. Sims*, 55 N.C. App. 459, 285 S.E.2d 839 (1982).

ARTICLE 9.

Nurse Practice Act.

§§ 90-158 to 90-171.18: Recodified as §§ 90-171.19 to 90-171.47.

Editor's Note. — This Article was rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and has been recodified as Article 9A, § 90-171.19 et seq., of this Chapter.

Repeal of Article. —

Session Laws 1981, c. 360, s. 4, amended

§ 143-34.12 (codified from Session Laws 1977, c. 712, s. 3) so as to eliminate the provisions repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

ARTICLE 9A.

Nursing Practice Act.

§ 90-171.19. Legislative findings.

The General Assembly of North Carolina finds that mandatory licensure of all who engage in the practice of nursing is necessary to ensure minimum standards of competency and to provide the public safe nursing care. (1981, c. 360, s. 1.)

Editor's Note. — This Article is Article 9 of this Chapter as rewritten by Session Laws 1981, c. 360, s. 1, effective July 1, 1981, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to the corresponding sections of the new Article.

Session Laws 1981, c. 360, s. 3, contains a severability clause.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

§ 90-171.20. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) "Board" means the North Carolina Board of Nursing.
- (2) "Health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this Article, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider.
- (3) "License" means a permit issued by the Board to practice nursing as a registered nurse or as a licensed practical nurse, including a renewal thereof.

- (4) "Nursing" is a dynamic discipline which includes the caring, counseling, teaching, referring and implementing of prescribed treatment in the prevention and management of illness, injury, disability or the achievement of a dignified death. It is ministering to; assisting; and sustained, vigilant, and continuous care of those acutely or chronically ill; supervising patients during convalescence and rehabilitation; the supportive and restorative care given to maintain the optimum health level of individuals and communities; the supervision, teaching, and evaluation of those who perform or are preparing to perform these functions; and the administration of nursing programs and nursing services.
- (5) "Nursing program" means any educational program in North Carolina offering to prepare persons to meet the educational requirements for licensure under this Article.
- (6) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.
- (7) The "practice of nursing by a registered nurse" consists of the following nine components:
 - a. Assessing the patient's physical and mental health, including the patient's reaction to illnesses and treatment regimens;
 - b. Recording and reporting the results of the nursing assessment;
 - c. Planning, initiating, delivering, and evaluating appropriate nursing acts;
 - d. Teaching, delegating to or supervising other personnel in implementing the treatment regimen;
 - e. Collaborating with other health care providers in determining the appropriate health care for a patient but, subject to the provisions of G.S. 90-18.2, not prescribing a medical treatment regimen or making a medical diagnosis, except under supervision of a licensed physician;
 - f. Implementing the treatment and pharmaceutical regimen prescribed by any person authorized by State law to prescribe such a regimen;
 - g. Providing teaching and counseling about the patient's health care;
 - h. Reporting and recording the plan for care, nursing care given, and the patient's response to that care; and
 - i. Supervising, teaching, and evaluating those who perform or are preparing to perform nursing functions and administering nursing programs and nursing services.
- (8) The "practice of nursing by a licensed practical nurse" consists of the following five components:
 - a. Participating in assessing the patient's physical and mental health including the patient's reaction to illnesses and treatment regimens;
 - b. Recording and reporting the results of the nursing assessment;
 - c. Participating in implementing the health care plan developed by the registered nurse and/or prescribed by any person authorized by State law to prescribe such a plan, by performing tasks delegated by and performed under the supervision or under orders or directions of a registered nurse, physician licensed to practice medicine, dentist, or other person authorized by State law to provide such supervision;
 - d. Reinforcing the teaching and counseling of a registered nurse, physician licensed to practice medicine in North Carolina, or dentist; and
 - e. Reporting and recording the nursing care rendered and the patient's response to that care. (1981, c. 360, s. 1.)

OPINIONS OF ATTORNEY GENERAL

A registered nurse may administer certain medication pursuant to standing orders to a patient in a venereal disease clinic of a local health department after it is determined that he has a gonorrhea type discharge

or has had contact with someone having gonorrhea. See opinion of Attorney General to Dwight H. Wheless, Dare County Attorney, 50 N.C.A.G. 9 (1980).

§ 90-171.21. Board of Nursing; composition; selection; vacancies; qualifications; term of office; compensation.

(a) The Board shall consist of 15 members. Nine members shall be registered nurses. Four members shall be licensed practical nurses. Two members shall be representatives of the public.

(b) Selection. — The North Carolina Board of Nursing shall conduct an election each year to fill vacancies of nurse members of the Board scheduled to occur during the next year. Nominations of candidates for election of registered nurse members shall be made by written petition signed by not less than 10 registered nurses eligible to vote in the election. Nominations of candidates for election of licensed practical nurse members shall be made by written petition signed by not less than 10 licensed practical nurses eligible to vote in the election. Every licensed registered nurse shall be eligible to vote in the election of registered nurse board members. Every licensed practical nurse shall be eligible to vote in the election of licensed practical nurse board members. The list of nominations shall be filed with the Board after January 1 of the year in which the election is to be held and no later than midnight of the first day of April of such year. Before preparing ballots, the Board shall notify each person who has been duly nominated of his nomination and request permission to enter his name on the ballot. A member of the Board who is nominated to succeed himself and who does not withdraw his name from the ballot is disqualified to participate in conducting the election. Elected members shall begin their term of office on January 1 of the year following their election.

Nominations of persons to serve as public members of the Board may be made to the Governor by any citizen or group within the State. The Governor shall appoint the two public members to the Board.

Board members shall be commissioned by the Governor upon their election or appointment.

(c) Vacancies. — The Governor shall fill all unexpired terms on the Board within 30 days after the term is vacated. For vacancies of registered nurse or licensed practical nurse members, the Governor shall appoint the person who received the next highest number of votes to those elected members at the most recent election for board members. The Governor shall select the public member to fill any vacancy of a public member. Appointees shall serve the remainder of the unexpired term and until their successors have been duly elected or appointed and qualified.

(d) Qualifications. — Three of the registered nurse members shall hold positions with primary responsibility in nursing education and shall hold baccalaureate or advanced degrees. Six shall hold positions with primary responsibility in providing nursing care to patients. Of the six registered nurse members with primary responsibility in providing nursing care to patients, two shall be employed by a hospital and at least one shall be a hospital nursing service director; one shall be employed by a physician licensed to practice medicine in North Carolina and engaged in the private practice of medicine; one shall be employed by a skilled or intermediate care facility; one shall be a registered nurse, approved to perform medical acts; and one shall be a com-

munity health nurse. If no nurse is nominated in one of the categories, the position shall be an at-large registered nursing position. All registered nurse members shall meet the following criteria:

- (1) Hold a current license to practice as a registered nurse in North Carolina;
- (2) Have at least five years' experience in nursing practice, nursing administration, and/or nursing education; and
- (3) Have been engaged in nursing practice, nursing administration, or nursing education for at least three years immediately preceding election.

Licensed practical nurse members shall meet the following criteria:

- (1) Hold a current license to practice as a licensed practical nurse in North Carolina;
- (2) Be a graduate of a board-approved program for the preparation of practical nurses;
- (3) Have at least five years' experience as a licensed practical nurse; and
- (4) Have been engaged in practical nursing for at least three years immediately preceding election.

A public member shall not be a health care provider nor the spouse of a health care provider. Public members shall reasonably represent the population of the State.

(e) Term. — The term of office for board members shall be three years. No member shall serve more than two consecutive three-year terms after July 1, 1981.

(f) Removal. — The Board may remove any of its members for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved.

(g) Reimbursement. — Board members are entitled to receive compensation and reimbursement as authorized by G.S. 93B-5. (1981, c. 360, s. 1; c. 852, s. 1.)

Editor's Note. — Session Laws 1981, c. 360, s. 2, as amended by Session Laws 1981, c. 852, s. 2, provides:

"On January 1, 1982, the terms of office of all board members shall expire and the Governor shall appoint two public members to the board as follows: one for a one-year term and one for a two-year term. The North Carolina Board of Nursing shall conduct an election in 1981 to elect:

- (1) for a one-year term: a community health nurse, a nurse educator, and two licensed practical nurses;
- (2) for a two-year term: a nurse educator, a nurse approved to perform medical acts, a hospital employed director of nursing services, and one licensed practical nurse; and

- (3) for a three-year term: one nurse educator, one nurse employed by a physician primarily engaged in the private practice of medicine, one registered nurse employed by a skilled or intermediate care facility, one registered nurse employed by a hospital and primarily engaged in providing patient care services, and one licensed practical nurse. Thereafter, members shall serve a three-year term and shall be selected as provided in G.S. 90-160 [90-171.21]."

Effect of Amendments. — The 1981 amendment deleted "immunity" from the end of the section heading.

§ 90-171.22. Officers.

The officers of the Board shall be a chairman, who shall be a registered nurse, a vice-chairman, and such other officers as the Board may deem necessary. All officers shall be elected annually by the Board for terms of one year and shall serve until their successors have been elected and qualified. (1981, c. 360, s. 1.)

§ 90-171.23. Duties, powers, and meetings.

(a) Meetings. The Board shall hold at least two meetings each year to transact its business. The Board shall adopt rules with respect to calling, holding, and conducting regular and special meetings and attendance at meetings. The majority of the Board members constitutes a quorum.

(b) Duties, powers. The Board is empowered to:

- (1) Administer this Article;
- (2) Issue its interpretations of this Article;
- (3) Adopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article;
- (4) Establish qualifications of, employ, and set the compensation of an executive officer who shall be a registered nurse and who shall not be a member of the Board;
- (5) Employ and fix the compensation of other personnel that the Board determines are necessary to carry into effect this Article and incur other expenses necessary to effectuate this Article;
- (6) Examine, license, and renew the licenses of duly qualified applicants for licensure;
- (7) Cause the prosecution of all persons violating this Article;
- (8) Prescribe standards to be met by the students, and to pertain to faculty, curricula, facilities, resources, and administration for any nursing program as provided in G.S. 90-171.38;
- (9) Survey all nursing programs at least every five years or more often as deemed necessary by the Board or program director;
- (10) Grant or deny approval for nursing programs as provided in G.S. 90-171.39;
- (11) Upon request, grant or deny approval of continuing education programs for nurses as provided in G.S. 90-171.42;
- (12) Keep a record of all proceedings and make available to the Governor and licensees an annual summary of all actions taken;
- (13) Appoint, as necessary, advisory committees which may include persons other than Board members to deal with any issue under study;
- (14) Appoint and maintain a subcommittee of the Board to work jointly with the subcommittee of the Board of Medical Examiners to develop rules and regulations to govern the performance of medical acts by registered nurses and to determine reasonable fees to accompany an application for approval or renewal of such approval as provided in G.S. 90-6. The fees and rules developed by this subcommittee shall govern the performance of medical acts by registered nurses and shall become effective when they have been adopted by both Boards;
- (15) Recommend and collect such fees for licensure, license renewal, examinations and reexaminations as it deems necessary for fulfilling the purposes of this Article; and
- (16) Adopt a seal containing the name of the Board for use on all certificates, licenses, and official reports issued by it. (1981, c. 360, s. 1; c. 665, s. 2; c. 852, s. 4.)

Effect of Amendments. — The first 1981 amendment added to subdivision (b)(14) as enacted by Session Laws 1981, c. 360, a provision as to maximum fees to accompany an application for approval or renewal of approval.

The second 1981 amendment rewrote subdivision (b)(14).

§ 90-171.24. Executive director.

The executive director shall perform the duties prescribed by the Board, serve as treasurer to the Board, and furnish a surety bond as provided in G.S. 128-8. The bond shall be made payable to the Board. (1981, c. 360, s. 1.)

Editor's Note. — Section 128-8, referred to in this section, was repealed by Session Laws 1981, c. 884, s. 13, effective July 8, 1981.

§ 90-171.25. Custody and use of funds.

The executive director shall deposit in financial institutions designated by the Board as official depositories all fees payable to the Board. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Article. Such funds shall be annually audited by the State Auditor. (1981, c. 360, s. 1.)

§ 90-171.26. The Board may accept contributions, etc.

The Board may accept grants, contributions, devices, bequests, and gifts which shall be kept in a separate fund and shall be used by it to enhance the practice of nursing. (1981, c. 360, s. 1.)

§ 90-171.27. Expenses payable from fees collected by Board.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article, or funds received from other sources. In no case shall any salary, expense, or other obligation of the Board be charged against the treasury of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article.

(b) The schedule of fees shall not exceed the following rates:

Application for examination leading to certificate and license as registered nurse	\$45.00
Application for certificate and license as registered nurse by endorsement	45.00
Application for each re-examination leading to certificate and license as registered nurse	45.00
Renewal of license to practice as registered nurse (two-year period)	25.00
Reinstatement of lapsed license to practice as a registered nurse and renewal fee	50.00
Application for examination leading to certificate and license as licensed practical nurse by examination	45.00
Application for certificate and license as licensed practical nurse by endorsement	45.00
Application for each re-examination leading to certificate and license as licensed practical nurse	45.00
Renewal of license to practice as a licensed practical nurse (two-year period)	25.00
Reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee	50.00

Reasonable charge for duplication services and materials.

(c) No refund of fees will be made. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, ss. 2, 3; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1971, c. 534; 1981, c. 360, s. 1; 1981, c. 661.)

Effect of Amendments. —The 1981 amendment, effective July 1, 1981, rewrote subsection (a) and raised all the fees set out in subsection (b).

§ 90-171.28. Nurses registered under previous law.

On June 30, 1981, any nurse who holds a license to practice nursing as a registered nurse or licensed practical nurse, issued by a competent authority pursuant to laws providing for the licensure of nurses in North Carolina, shall be deemed to be licensed under the provisions of this Article, but such person shall otherwise comply with the provisions of this Article including those provisions governing licensure renewal. (1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.29. Qualifications of applicants for examination.

In order to be eligible for licensure by examination, the applicant shall make a written application to the Board on forms furnished by the Board and shall submit to the Board an application fee and written evidence, verified by oath, sufficient to satisfy the Board that the applicant has graduated from a course of study approved by the Board and is mentally and physically competent to practice nursing. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, s. 2; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1973, c. 93, s. 4; 1981, c. 360, s. 1.)

§ 90-171.30. Licensure by examination.

At least twice each year the Board shall give an examination at the time and place it determines, to applicants for licensure to practice as a registered nurse or licensed practical nurse. The Board shall give advance notice to applicants and to persons conducting approved nursing programs of the time and place of each examination. The Board shall adopt regulations, not inconsistent with this Article, governing qualifications of applicants, the conduct of applicants during the examination, and the conduct of the examination. The applicants shall be required to pass a written examination approved and administered by the Board. When the Board determines that an applicant has passed the required examination, submitted the required fee, and has demonstrated to the Board's satisfaction that he or she is mentally and physically competent to practice nursing, the Board shall issue a license to the applicant. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.31. Reexamination.

Any applicant who fails to pass the first licensure examination may take subsequent examinations in accordance with the rules and regulations of the Board, provided that any person who has graduated from a nursing program after July 1, 1981, must pass the examination within three years of graduation. After this three-year period, the applicant must reenter and successfully complete a Board-approved nursing program before being allowed to take subsequent examinations. (1981, c. 360, s. 1.)

§ 90-171.32. Qualifications for license as a registered nurse or a licensed practical nurse without examination.

The Board may, without examination, issue a license to an applicant who is duly licensed as a registered nurse or licensed practical nurse under the laws of another state, territory of the United States, the District of Columbia, or foreign country when that jurisdiction's requirements for licensure as a registered nurse or a licensed practical nurse, as the case may be, are substantially equivalent to or exceed those of the State of North Carolina at the time the applicant was initially licensed, and when, in the Board's opinion, the applicant is competent to practice nursing in this State. The Board may require such applicant to prove competence and qualifications to practice as a registered nurse or licensed practical nurse in North Carolina. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1981, c. 360, s. 1.)

§ 90-171.33. Temporary license.

The Board shall issue a nonrenewable temporary license to persons applying for licensure under G.S. 90-171.30 for a period not to exceed the lesser of six months or the date of applicant's receipt of the results of the licensure examination. The Board shall revoke the temporary license of any person who has failed the examination for licensure as provided by this act. The Board shall issue a nonrenewable temporary license to persons applying for licensure under G.S. 90-171.32 for a period not to exceed the lesser of six months or until the Board determines whether the applicant is qualified to practice nursing in North Carolina. Temporary licensees may perform patient-care services within limits defined by the Board. In defining these limits, the Board shall consider the ability of the temporary licensee to safely and properly carry out patient-care services. Temporary licensees shall be held to the standard of care of a fully licensed nurse. (1981, c. 360, s. 1.)

§ 90-171.34. Licensure renewal.

Every license issued under this Article shall be renewed every two years. On or before the date the current license expires, every person who desires to continue to practice nursing shall apply for licensure renewal to the Board on forms furnished by the Board and shall also file the required fee. The Board shall provide space on the renewal form for the licensee to specify the amount of continuing education received during the renewal period. Failure to renew the license within 30 days after the expiration date shall result in automatic forfeiture of the right to practice nursing in North Carolina. (1981, c. 360, s. 1.)

§ 90-171.35. Reinstatement.

A licensee who has allowed license to lapse by failure to renew as herein provided may apply for reinstatement on a form provided by the Board. The Board shall require the applicant to return the completed application with the required fee and to furnish a statement of the reason for failure to apply for renewal prior to the deadline. If the license has lapsed for at least five years, the Board shall require the applicant to complete satisfactorily a refresher course approved by the Board. The Board may require any applicant for reinstatement to satisfy the Board that the license should be reinstated. If, in the opinion of the Board, the applicant has so satisfied the Board, it shall issue a renewal of license to practice nursing, or it shall issue a license to practice nursing for a limited time. (1981, c. 360, s. 1.)

§ 90-171.36. Inactive list.

(a) When a licensee submits a request for inactive status, the Board shall issue to the licensee a statement of inactive status and shall place the licensee's name on the inactive list. While on the inactive list, the person shall not be subjected to renewal requirements and shall not practice nursing in North Carolina.

(b) When such person desires to be removed from the inactive list and returned to the active list, an application shall be submitted to the Board on a form furnished by the Board and the fee shall be paid for license renewal. The Board shall require evidence of competency to resume the practice of nursing before returning the applicant to active status. (1981, c. 360, s. 1.)

§ 90-171.37. Revocation, suspension, or denial of licensure.

In accordance with the provisions of Chapter 150A of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or suspend any license to practice nursing in North Carolina or deny any application for licensure if the Board determines that the nurse or applicant:

- (1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a license to practice nursing;
- (2) Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the nurse is unfit or incompetent to practice nursing or that the nurse has deceived or defrauded the public;
- (3) Has a mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice nursing;
- (4) Engages in conduct that endangers the public health;
- (5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established;
- (6) Engages in conduct that deceives, defrauds, or harms the public in the course of professional activities or services; or
- (7) Has willfully violated any provision of this Article or of regulations enacted by the Board.

The Board may take any of the actions specified above in this section when a registered nurse approved to perform medical acts has violated rules governing the performance of medical acts by a registered nurse; provided this shall not interfere with the authority of the Board of Medical Examiners to enforce rules and regulations governing the performance of medical acts by a registered nurse.

The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the nurse or applicant can reasonably be expected to safely and properly practice nursing. (1981, c. 360, s. 1; c. 852, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "above in" for "in subdivisions (1) through (7) of" near the beginning of the second sentence.

§ 90-171.38. Standards for nursing programs.

A nursing program may be operated under the authority of a general hospital, an educational institution or agency, or any other authority satisfactory to the Board. The Board shall establish, revise, or repeal standards for nursing programs. These standards shall specify program requirements, curricula, fac-

ulty, students, facilities, resources, administration, and describe the approval process. The standards approved by the Board and in effect on June 30, 1980, shall be the prescribed standards. Before making any substantive change in the standards the Board shall hold a hearing in accordance with Chapter 150A. Any institution desiring to establish a nursing program shall apply to the Board and submit satisfactory evidence that it will meet the standards prescribed by the Board. Those standards shall be designed to ensure that graduates of those programs have the educational training to safely and properly practice nursing. The Board shall encourage the continued operation of all present programs that meet the standards approved by the Board and the Board shall promote the establishment of additional programs. (1981, c. 360, s. 1.)

§ 90-171.39. Approval.

The Board shall designate persons to survey proposed nursing programs, including the clinical facilities. The persons designated by the Board shall submit a written report of the survey to the Board. If in the opinion of the Board the standards for approved nursing education are met, the program shall be given approval. (1981, c. 360, s. 1.)

§ 90-171.40. Periodic surveys.

The Board shall designate persons to survey all nursing programs in the State at least every five years or more often as deemed necessary. Written reports of such surveys shall be submitted to the Board. If the Board determines that any approved nursing program does not meet or maintain the standards required by the Board, notice thereof in writing specifying the deficiencies shall be given immediately to the institution responsible for the program. The Board shall withdraw approval from a program which fails to correct deficiencies within a reasonable time. The Board shall publish annually a list of nursing programs in this State showing their approval status. (1981, c. 360, s. 1.)

§ 90-171.41. Baccalaureate in nursing candidate credits.

Every graduate of a diploma or associate degree school of nursing in this State who has passed the registered nurse examination shall, upon admission to any State-supported institution of higher learning offering baccalaureate education in nursing, be granted credit for previous experience in the diploma or associate degree school of nursing on an individual basis by the utilization of the most effective method of evaluation to the end that the applicant shall receive optimum credit and that upon graduation the applicant will have earned the baccalaureate degree in nursing. (1969, c. 547, s. 1; 1981, c. 360, s. 1.)

§ 90-171.42. Continuing education programs.

(a) Upon request, the Board shall grant approval to continuing education programs upon a finding that the program offers an educational experience designed to enhance the practice of nursing.

(b) If the program offers to teach nurses to perform advance skills, the Board may grant approval for the program and the performance of the advanced skills by those successfully completing the program when it finds that the nature of the procedures taught in the program and the program facilities and faculty are such that a nurse successfully completing the program can reasonably be expected to carry out those procedures safely and properly. (1981, c. 360, s. 1.)

§ 90-171.43. License required.

No person shall practice or offer to practice as or use any card, title or abbreviation to indicate that such person is a registered nurse or licensed practical nurse unless that person is currently licensed as provided by this Article. This Article shall not, however, be construed to prohibit or limit the following:

- (1) The performance by any person of any act for which that person holds a license issued pursuant to North Carolina law;
- (2) The clinical practice by students enrolled in approved nursing programs under the supervision of qualified faculty;
- (3) The performance of nursing performed by persons who hold a temporary license issued pursuant to G.S. 90-171.33;
- (4) The delegation to any person, including a member of the patient's family, by a physician licensed to practice medicine in North Carolina, a licensed dentist or registered nurse of those patient-care services which are routine, repetitive, limited in scope that do not require the professional judgment of a registered nurse or licensed practical nurse;
- (5) Assistance by any person in the case of emergency.

Any person permitted to practice nursing without a license as provided in subdivision (2) or (3) of this section shall be held to the same standard of care as any licensed nurse. (1981, c. 360, s. 1.)

§ 90-171.44. Prohibited acts.

It shall be a violation of this Article for any person to:

- (1) Sell, fraudulently obtain, or fraudulently furnish any nursing diploma or aid or abet therein;
- (2) Practice nursing under cover of any fraudulently obtained license;
- (3) Practice nursing without a license;
- (4) Conduct a nursing program that is not approved by the Board; or
- (5) Employ unlicensed persons to practice nursing in violation of this Article. (1981, c. 360, s. 1.)

§ 90-171.45. Violation of Article.

The violation of any provision of this Article, except G.S. 90-171.47, shall be a misdemeanor punishable in the discretion of the court. (1981, c. 360, s. 1.)

§ 90-171.46. Injunctive authority.

The Board may apply to the superior court for an injunction to prevent violations of this Article or of any rules enacted pursuant thereto. The court is empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. (1981, c. 360, s. 1.)

§ 90-171.47. Reports: immunity from suit.

Any person who has reasonable cause to suspect misconduct or incapacity of a licensee or who has reasonable cause to suspect that any person is in violation of this Article, including those actions specified in G.S. 90-171.37 (1) through (7), should report the relevant facts to the Board. Upon receipt of such charge or upon its own initiative, the Board may give notice of an administrative hearing or may, after diligent investigation, dismiss unfounded charges. Any person making a report pursuant to this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person

knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 360, s. 1.)

ARTICLE 10.

Midwives.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1983, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-172: Repealed by Session Laws 1983, c. 897, s. 2, effective October 1, 1983.

Cross References. — For present provisions as to regulation of midwifery, see § 90-178.1 et seq.

Editor's Note. — Section 90-172 was amended by Session Laws 1981, c. 676, s. 3.

Session Laws 1983, c. 897, s. 3, provides: "This act shall become effective October 1, 1983. Any person who on October 1, 1983, had

been a practicing midwife in North Carolina for more than 10 years may continue to assist at childbirth without approval under this Article. Any other person authorized to practice midwifery on September 30, 1983, may continue to practice midwifery without approval under this Article until April 1, 1984. No annual fee shall be collected for 1983."

ARTICLE 10A.

Practice of Midwifery.

§ 90-178.1. Title.

This Article shall be known and may be cited as the Midwifery Practice Act. (1983, c. 897, s. 1.)

Editor's Note. — Session Laws 1983, c. 897, s. 3, provides: "This Act shall become effective October 1, 1983. Any person who on October 1, 1983, had been a practicing midwife in North Carolina for more than 10 years may continue to assist at childbirth without approval under

this Article. Any other person authorized to practice midwifery on September 30, 1983, may continue to practice midwifery without approval under this Article until April 1, 1984. No annual fee shall be collected for 1983."

§ 90-178.2. Definitions.

As used in this Article:

(1) "Interconceptional care" includes but is not limited to:

- a. Family planning;
- b. Screening for cancer of the breast and reproductive tract; and
- c. Screening for and management of minor infections of the reproductive organs;

(2) "Intrapartum care" includes but is not limited to:

- a. Attending women in uncomplicated labor;
 - b. Assisting with spontaneous delivery of infants in vertex presentation from 37 to 42 weeks gestation;
 - c. Performing amniotomy;
 - d. Administering local anesthesia;
 - e. Performing episiotomy and repair; and
 - f. Repairing lacerations associated with childbirth.
- (3) "Midwifery" means the act of providing prenatal, intrapartum, postpartum, newborn and interconceptional care. The term does not include the practice of medicine by a physician licensed to practice medicine when engaged in the practice of medicine as defined by law, the performance of medical acts by a physician assistant or nurse practitioner when performed in accordance with the rules of the Board of Medical Examiners, the practice of nursing by a registered nurse engaged in the practice of nursing as defined by law, or the rendering of childbirth assistance in an emergency situation.
- (4) "Newborn care" includes but is not limited to:
- a. Routine assistance to the newborn to establish respiration and maintain thermal stability;
 - b. Routine physical assessment including APGAR scoring;
 - c. Vitamin K administration; and
 - d. Eye prophylaxis for ophthalmia neonatorum.
- (5) "Postpartum care" includes but is not limited to:
- a. Management of the normal third stage of labor;
 - b. Administration of pitocin and methergine after delivery of the infant when indicated; and
 - c. Six weeks postpartum evaluation exam and initiation of family planning.
- (6) "Prenatal care" includes but is not limited to:
- a. Historical and physical assessment;
 - b. Obtaining and assessing the results of routine laboratory tests; and
 - c. Supervising the use of prenatal vitamins, folic acid, iron, and nonprescription medicines. (1983, c. 897, s. 1.)

§ 90-178.3. Regulation of midwifery.

(a) No person shall practice or offer to practice or hold oneself out to practice midwifery unless approved pursuant to this Article.

(b) A person approved pursuant to this Article may practice midwifery in a hospital or non-hospital setting and shall practice under the supervision of a physician licensed to practice medicine who is actively engaged in the practice of obstetrics. A registered nurse approved pursuant to this Article is authorized to write prescriptions for drugs in accordance with the same conditions applicable to a nurse practitioner under G.S. 90-18.2(b). (1983, c. 897, s. 1.)

§ 90-178.4. Administration.

(a) The joint subcommittee of the Board of Medical Examiners and the Board of Nursing created pursuant to G.S. 90-18.2 shall administer the provisions of this Article and the rules adopted pursuant to this Article; Provided, however, that actions of the joint subcommittee pursuant to this Article shall not require approval by the Boards of Medical Examiners and of Nursing. For purposes of this Article, the joint subcommittee shall be enlarged by four additional members, including two certified midwives and two obstetricians who have had working experience with midwives.

(b) The joint subcommittee shall adopt rules pursuant to this Article to establish:

- (1) A fee which shall cover application and initial approval up to a maximum of one hundred dollars (\$100.00);
- (2) An annual renewal fee to be paid by January 1 of each year by persons approved pursuant to this Article up to a maximum of fifty dollars (\$50.00);
- (3) A reinstatement fee for a lapsed approval up to a maximum of five dollars (\$5.00);
- (4) The form and contents of the applications which shall include information related to the applicant's education and certification by the American College of Nurse-Midwives; and
- (5) The procedure for establishing physician supervision as required by this Article.

(c) The joint subcommittee may solicit, employ, or contract for technical assistance and clerical assistance and may purchase or contract for the materials and services it needs.

(d) All fees collected on behalf of the joint subcommittee and all receipts of every kind and nature, as well as the compensation paid the members of the joint subcommittee and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the joint subcommittee pursuant to the provisions of the General Statutes shall be kept in a separate fund by the joint subcommittee, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the joint subcommittee and to enforce the provisions of this Article. No expense incurred by the joint subcommittee shall be charged against the State.

(e) Members of the joint subcommittee who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the joint subcommittee who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1983, c. 897, s. 1.)

§ 90-178.5. Qualifications for approval.

In order to be approved by the joint subcommittee pursuant to this Article, a person shall:

- (1) Complete an application on a form furnished by the joint subcommittee;
- (2) Submit evidence of certification by the American College of Nurse-Midwives;
- (3) Submit evidence of arrangements for physician supervision; and
- (4) Pay the fee for application and approval. (1983, c. 897, s. 1.)

§ 90-178.6. Denial, revocation or suspension of approval.

(a) In accordance with the provisions of Chapter 150A, the joint subcommittee may deny, revoke or suspend approval when a person has:

- (1) Failed to satisfy the qualifications for approval;
- (2) Failed to pay the annual renewal fee by January 1 of the current year;
- (3) Given false information or withheld material information in applying for approval;
- (4) Demonstrated incompetence in the practice of midwifery;
- (5) Violated any of the provisions of this Article;
- (6) A mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice midwifery;
- (7) Engaged in conduct that endangers the public health;

- (8) Engaged in conduct that deceives, defrauds, or harms the public in the course of professional activities or services; or
 - (9) Been convicted of or pleaded guilty or nolo contendere to any felony under the laws of the United States or of any state of the United States indicating professional unfitness.
- (b) Revocation or suspension of a license to practice nursing pursuant to G.S. 90-171.37 shall automatically result in comparable action against the person's approval to practice midwifery under this Article. (1983, c. 897, s. 1.)

§ 90-178.7. Enforcement.

(a) The joint subcommittee may apply to the Superior Court of Wake County to restrain any violation of this Article.

(b) Any person who violates G.S. 90-172.3(a) shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding one hundred dollars (\$100.00) or imprisonment for not more than 30 days or both in the discretion of the court. (1983, c. 897, s. 1.)

ARTICLE 11.

Veterinarians.

Repeal of Article. —

Session Laws 1981, c. 767, s. 15, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

(a) In order to properly regulate the practice of veterinary medicine and surgery, there is established a Board to be known as the North Carolina Veterinary Medical Board which shall consist of seven members.

Four members shall be appointed by the Governor. Three of these members shall have been legal residents of and licensed to practice veterinary medicine in this State for not less than five years preceding their appointment. The other member shall not be licensed or registered under the Article and shall represent the interest of the public at large.

The Lieutenant Governor and the Speaker of the House shall each appoint to the Board one member who shall have been a resident of and licensed to practice veterinary medicine in this State for not less than five years preceding his appointment.

In addition to the six members appointed as provided above, the Commissioner of Agriculture shall biennially appoint to the Board the State Veterinarian or licensed veterinarian from a staff of a North Carolina department or institution. This member shall have been a legal resident of and licensed to practice veterinary medicine in North Carolina for not less than five years preceding his appointment.

Every member shall, within 30 days after notice of appointment, appear before any person authorized to administer the oath of office and take an oath to faithfully discharge the duties of his office.

(b) No person who has been appointed to the Board shall continue his membership on the Board if during the term of his appointment he shall:

- (1) Transfer his legal residence to another state; or

(2) Own or be employed by any wholesale or jobbing house dealing in supplies, equipment, or instruments used or useful in the practice of veterinary medicine; or

(3) Have his license to practice veterinary medicine rescinded for any of the causes listed in G.S. 90-187.8.

(c) All members serving on the board on June 30, 1981, shall complete their respective terms. The Governor shall appoint the public member not later than July 1, 1981. No member appointed to the Board by the Governor, Lieutenant Governor or Speaker of the House of Representatives on or after July 1, 1981, shall serve more than two complete consecutive five-year terms, except that each member shall serve until his successor is appointed and qualifies.

(d) The appointing authority may remove his appointee for the reasons specified in subsection (b) or for any good cause shown and may appoint members to fill unexpired terms. (1903, c. 503, s. 2; Rev., s. 5432; C. S., s. 6755; 1961, c. 353, s. 3; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 1.)

Effect of Amendments. — The 1981 amendment substituted subsection (a) for two former paragraphs concerning membership of the North Carolina Veterinary Medical Board, redesignated the former third paragraph as subsection (b) and substituted "to" for "a member of" following "appointed," inserted "his membership" and substituted "the" for "said"

preceding "board" in the introductory clause of that subsection. The amendment substituted "Own" for "Be or become the owner of" in subdivision (b)(2), substituted "any of the causes listed in G.S. 90-187.8" for "cause in accordance with the provisions of Chapter 150A of the General Statutes" in subdivision (b)(3), and added subsections (c) and (d).

§ 90-184. Compensation of the Board.

In addition to such reimbursement for travel and other expenses as is normally allowed to State employees, each member of the Board, for each day or substantial portion thereof he is engaged in the work of the Board may receive a per diem allowance, as determined by the Board, not to exceed thirty-five dollars (\$35.00) per day. None of the expenses of the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C. S., s. 6757; 1961, c. 353, s. 4; 1973, c. 1106, s. 1; 1981, c. 767, s. 2.)

Effect of Amendments. — The 1981 amendment inserted "of" following "expenses" in the second sentence.

§ 90-185. General powers of the Board.

The Board shall have the power to:

- (1) Examine and determine the qualifications and fitness of applicants for a license to practice veterinary medicine in the State.
- (2) Issue, renew, deny, suspend, or revoke licenses and temporary permits to practice veterinary medicine in the State or otherwise discipline licensed veterinarians consistent with the provisions of Chapter 150A of the General Statutes and of this Article and the rules and regulations adopted thereunder.
- (3) Conduct investigations for the purpose of discovering violations of this Article or grounds for disciplining licensed veterinarians.
- (4) Employ full-time or part-time personnel — professional, clerical, or special — necessary to effectuate the provisions of this Article and to purchase or rent necessary office space, equipment and supplies.
- (5) Appoint from its own membership one or more members to act as representatives of the Board at any meeting within or without the State where such representation is deemed desirable.

- (6) Adopt, amend, or repeal all rules necessary for its government and all regulations necessary to carry into effect the provisions of this Article, including the establishment and publication of standards of professional conduct for the practice of veterinary medicine.

The powers enumerated above are granted for the purpose of enabling the Board effectively to supervise the practice of veterinary medicine and are to be construed liberally to accomplish this objective. (1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "provisions" for "provision" and inserted "to" preceding "purchase" in subdivision (4) and substituted "provisions" for

"provision" in subdivision (6). The amendment also made a minor technical change in subdivision (2).

§ 90-186. Special powers of the Board.

In addition to the powers set forth in G.S. 90-185 above, the Board shall have the power:

- (3) To provide special registration for "animal technicians," "veterinary student interns" and "veterinary student preceptees" as defined in G.S. 90-181, and to adopt regulations concerning the training, registration and service limits of such assistants while employed by and acting under the supervision and responsibility of licensed veterinarians and to have exclusive jurisdiction in determining eligibility, and qualification requirements and in granting or refusing to grant, or to suspend or revoke registration, provided that any suspension or revocation of a special registration issued under this section shall be conducted under the provisions of Chapter 150A of the General Statutes. The Board shall have power to require a registration fee not to exceed five dollars (\$5.00) for original registration and not to exceed five dollars (\$5.00) for renewal. (1973, c. 1106, s. 1; 1981, c. 767, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added the proviso to the first sentence of subdivision (3).

§ 90-187. Application for license; qualifications.

(b) The application shall show that the applicant is a graduate of an accredited veterinary school, a person of good moral character, and such other information and proof as the Board may require by rule. The application shall be accompanied by a fee in the amount established and published by the Board.

(d) If the Board determines that the applicant possesses the proper qualifications, it shall admit the applicant to the next examination, or if the applicant is eligible for a license without examination under G.S. 90-187.3; the Board shall forthwith grant him a license.

(1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1; 1981, c. 767, ss. 5, 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment deleted "18 years of age or more" following "is" in the first sentence of subsection (b) and substituted "shall" for "may" preceding "forthwith" in subsection (d).

§ 90-187.3. Applicants licensed in other states.

(a) The Board shall issue a license without written examination to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

- (1) The applicant is currently an active, competent practitioner in good standing; and
- (2) The applicant has practiced at least three of the five years immediately preceding his application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) There is no disciplinary proceeding or unresolved complaint pending against the applicant at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are substantially equivalent to those required by this State.

(b) The Board may at its discretion issue a license without written examination to applicants who meet the requirements of G.S. 90-187(c).

(c) The Board may at its discretion orally or practically examine any person qualifying for licensure under this section. (1959, c. 744; 1973, c. 1106, s. 1; 1981, c. 767, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote subsection (a), added subsection (b), redesignated former subsection (b) as subsection (c) and, in that subsection, substituted

"The Board may at its discretion" for "At its discretion, the Board" and substituted "licensure" for "licensing."

§ 90-187.6. Veterinary assistants.

(b) The services of a technician, intern, preceptee, or other veterinary employee shall be limited to services under the direction and supervision of a licensed veterinarian. He shall receive no fee or compensation of any kind for his services other than such salary or compensation as may be paid to him by the veterinarian, hospital or clinic by which he is employed. He may participate in the operation of a branch office, clinic, or allied establishment only to the extent allowable under and as defined [by this Article and by rules of the Board.]

(c) An employee under the supervision of a licensed veterinarian may perform such duties as are required in the physical care of animals and in carrying out medical orders as prescribed by the licensed veterinarian, requiring an understanding of animal science but not requiring the professional services as set forth in G.S. 90-181(6)a. In addition, a registered technician may assist licensed veterinarians in diagnosis, laboratory analysis, anesthesia, and surgical procedures. Neither the employee nor the technician may perform any act producing an irreversible change in the animal.

(f) Any person registered as an animal or veterinary technician, veterinary student intern or veterinary student preceptee, who shall practice veterinary medicine except as provided herein, shall be guilty of a misdemeanor, subject to the penalties set forth in this Article and shall also be subject to revocation of registration. Any nonregistered veterinary employee employed under subsection (c) who practices veterinary medicine except as provided under that subsection shall be guilty of a misdemeanor and subject to the penalties prescribed in G.S. 90-187.12.

(g) Any veterinarian directing or permitting a registered technician, intern, preceptee or other employee to perform a task or procedure not specifically allowed under this Article and the rules of the Board shall be guilty of a misdemeanor and subject to the penalties set forth in this Article or General Statutes, or both. (1973, c. 1106, s. 1; 1981, c. 767, ss. 8-11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted a comma for "or" following "intern" and inserted "or other veterinary employee" in the first sentence of subsection (b), substituted "by this Article and by rules of the Board" for "in subsection (a) above" in the last sentence of subsection (b), substituted "An employee" for "A registered technician, as an assistant to and" and substituted "G.S. 90-181(6)a" for "G.S. 90-181(7) hereof" in the first sentence of subsection (c), added the second sentence of subsection (c), substituted "Neither the employee nor the technician may" for "He

may not" in the third sentence of subsection (c), deleted "but may assist the veterinarian in" at the end of that sentence and deleted former subdivisions (c)(1) through (c)(5), which listed the tasks which registered technicians could perform in assisting a veterinarian. The amendment added the second sentence of subsection (f) and, in subsection (g), substituted a comma for "or" following "intern" and inserted "or other employee" following "preceptee." In amending subsection (b), the amendatory act directed that the "last sentence" of the subsection be rewritten to read "by this Article and by rules of the Board." The "last line" of the subsection was plainly intended.

§ 90-187.8. Discipline of licensees.

Upon complaint, and within the Board's discretion, the Board may revoke, or suspend the license of, or otherwise discipline, any licensed veterinarian under the provisions of Chapter 150A of the General Statutes of North Carolina. Grounds for disciplinary action shall include but not be limited to the following:

- (4) The use of advertising or solicitation which is false, misleading, or deceptive.
- (10) Failure to report, as required by the laws and regulations of the State, or making false report of, any contagious or infectious disease.
- (13) Revocation of a license to practice veterinary medicine by another state, territory or district of the United States only if the grounds for revocation in the other jurisdiction would also result in revocation of the practitioner's license in this State.

(1903, c. 503, s. 10; Rev., s. 5436; C. S., s. 6759; 1953, c. 1041, s. 16; 1961, c. 353, s. 7; 1973, c. 1106, s. 1; c. 1331, s. 3; 1981, c. 767, ss. 12, 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "deceptive" for "is otherwise deemed unprofessional under regulations adopted by the Board" in subdivision (4) and inserted a comma following "State" in subdivision (10). The amendment substituted "only if

the grounds for revocation in the other jurisdiction would also result in revocation of the practitioner's license in this State" for "on grounds other than nonpayment of registration fee" in subdivision (13). The amendatory act referred to "G.S. 187.8(13)," but subdivision (13) of this section was plainly intended. The amendment also made a minor technical change in the introductory paragraph.

§ 90-187.10. Necessity for license; certain practices exempted.

No person shall engage in the practice of veterinary medicine in this State or attempt to do so without having first applied for and obtained a license for such purpose from the North Carolina Veterinary Medical Board, or without having first obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice and until he shall have been first licensed and registered for such practice in the manner provided in this Article and the rules and regulations of the said Board.

Nothing in this Article shall be construed to prohibit:

- (1) Any person or his employee from administering to animals, the title to which is vested in himself, except when said title is so vested for the purpose of circumventing the provisions of this Article;

- (2) Any person who is a regular student or instructor in a legally chartered college from the performance of those duties and actions assigned as his responsibility in teaching or research;
- (3) Any veterinarian who is a member of the armed forces of the United States or who is an employee of the United States Department of Agriculture, the United States Public Health Service or other federal agency, or the State of North Carolina, or political subdivision thereof, from performing official duties while so commissioned or employed;
- (4) Any person from such practices as permitted under the provisions of G.S. 90-185, House Bill 659, Chapter 17, Public Laws 1937, or House Bill 358, Chapter 5, Private Laws 1941;
- (5) Any person from dehorning animals or castrating male animals;
- (6) Any person from providing for or assisting in the practice of artificial insemination;
- (7) Any physician licensed to practice medicine in this State, or his assistant, while engaged in medical research;
- (8) Any certified rabies vaccinator appointed, certified and acting with the provisions of G.S. 130A-186;
- (9) Any veterinarian licensed to practice in another state from examining livestock or acting as a consultant in North Carolina, provided he does not work in the State for more than 10 days in any calendar year and all infectious or contagious diseases diagnosed are reported to the State Veterinarian within 48 hours. (1903, c. 503, s. 12; Rev., s. 5438; C. S., s. 6761; 1961, c. 353, s. 9; 1973, c. 1106, s. 1; 1983, c. 891, s. 11.)

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date

of this act shall remain valid as if this act had not been enacted."

Effect of Amendments. — The 1983 amendment, effective Jan. 1, 1984, rewrote subdivision (8), which read "Any rabies inspector duly appointed and acting within the provisions of G.S. 106-365 and G.S. 106-366."

Legal Periodicals. — For a comment on the statutory standard of care for North Carolina Health Care Providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-187.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1981, c. 767, s. 14.)

ARTICLE 12A.

Podiatrists.

Repeal of Article. —

Session Laws 1981, c. 659, s. 11, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-202.2. "Podiatry" defined.**CASE NOTES**

Quoted in *Costin v. Shell*, 53 N.C. App. 117, 280 S.E.2d 42 (1981).

§ 90-202.4. Board of Podiatry Examiners; terms of office; powers; duties.

(a) There shall be established a Board of Podiatry Examiners for the State of North Carolina. This Board shall consist of four members appointed by the Governor. Three of the members shall be licensed podiatrists who have practiced podiatry in North Carolina for not less than seven years immediately preceding their election and who are elected and nominated to the Governor as hereinafter provided. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor may he or she be the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualified.

(c) Podiatrist members chosen as provided for in subsection (d) shall be selected upon the expiration of the respective terms of the members of the present Board of Podiatry Examiners. Membership on the Board resulting from appointment before July 1, 1981, shall not be considered in determining the permissible length of service under subsection (b). The Governor shall appoint the public member not later than July 1, 1981.

(d) The Governor shall appoint podiatrist members of the Board from a list provided by the Board of Podiatry Examiners. For each vacancy, the Board shall submit at least two names to the Governor. All nominations of podiatrist members of the Board shall be conducted by the Board of Podiatry Examiners, which is hereby constituted a Board of Podiatry Elections. Every podiatrist with a current North Carolina license residing in this State shall be eligible to vote in all elections. The list of licensed podiatrists shall constitute the registration list for elections. The Board of Podiatry Elections is authorized to make rules relative to the conduct of these elections, provided such rules are not in conflict with the provisions of this section and provided that notice shall be given to all licensed podiatrists residing in North Carolina. All such rules shall be adopted subject to the procedures of Chapter 150A of the General Statutes of North Carolina. From any decision of the Board of Podiatry Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner provided by Chapter 150A of the General Statutes.

(e) Any initial or regular member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the initial or regular

podiatrist membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of at least two names submitted by the podiatrist members of the Board. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term.

(f) The Board is authorized to elect its own presiding and other officers.

(g) The Board, in carrying out its responsibilities, shall have authority to employ personnel, full-time or part-time, as shall be determined to be necessary in the work of the Board. The Board shall have authority to pay compensation to the member of the Board holding the position of secretary-treasurer on a basis to be determined by the Board; Provided that in the event the positions of secretary and treasurer are not combined but are held by different members of the Board, the Board shall have authority to pay compensation to the member holding the position of secretary and to the member holding the position of treasurer, if the Board so chooses, on a basis to be determined by the Board. The Board is required to keep proper and complete records with respect to all of its activities, financial and otherwise, and shall on or before January 30 of each year submit a written report to the Governor and to such other officials and/or agencies as other sections of the General Statutes may require, said report covering the activities of the Board during the previous calendar year, which report shall include a verified financial statement. The Board is authorized to adopt rules and regulations governing its proceedings and the practice of podiatry in this State, not inconsistent with the provisions of this Article. The Board shall maintain at all times an up-to-date list of the names and addresses of each licensed podiatrist in North Carolina, which list shall be available for inspection and which shall be included in the annual report referred to above. (1919, c. 78, s. 3; C.S., s. 6765; 1963, c. 1195, s. 2; 1967, c. 1217, s. 3; 1975, c. 672, s. 1; 1981, c. 659, s. 1; 1983, c. 217, ss. 1-4.)

Effect of Amendments. — The 1981 amendment substituted subsections (a) through (f) for six sentences which formerly pertained to the same subject matter and redesignated the remainder of the section as subsection (g).

The 1983 amendment, effective April 22, 1983, substituted "seven years" for "five years"

in the third sentence of subsection (a), substituted "two names" for "three names" in the second sentence of subsection (d) and in the second sentence of subsection (e), and inserted the proviso at the end of the second sentence of subsection (g).

§ 90-202.5. Applicants to be examined; examination fee; requirements.

Any person not heretofore authorized to practice podiatry in this State shall file with the Board of Podiatry Examiners an application for examination accompanied by a fee not to exceed two hundred dollars (\$200.00), together with proof that the applicant is of good moral character, and has obtained a preliminary education equivalent to four years of instruction in a high school and two years of instruction in a college or university approved by the American Association of Colleges and Universities. Such applicant before presenting himself for examination must be a graduate of a college of podiatric medicine accredited by the National Council of Education of American Podiatry Association. (1919, c. 78, s. 9; C. S., s. 6766; 1963, c. 1195, ss. 1, 2; 1967, c. 1217, s. 4; 1975, c. 672, s. 1; 1981, c. 659, s. 2; 1983, c. 217, s. 5.)

Effect of Amendments. — The 1981 amendment deleted "is more than 18 years of age" following "applicant" in the first sentence.

The 1983 amendment, effective April 22,

1983, substituted "two hundred dollars (\$200.00)" for "one hundred dollars (\$100.00)" in the first sentence.

§ 90-202.6. Examinations; subjects; certificates.

(a) The Board of Podiatry Examiners shall hold at least one examination annually for the purpose of examining applicants under this Article. The examination shall be at such time and place as the Board may see fit. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide, preserve and keep a complete record of all its transactions. Examinations for registration under this Article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral or clinical, as the Board may determine, and may include the following subjects: anatomy, physiology, bacteriology, chemistry, dermatology, podiatry, surgery, materia medica, pharmacology and pathology. No applicant shall be granted a license certificate by the Board unless he obtains a general average of 75 or over, and not less than fifty percent (50%) in any one subject. After such examination the Board shall without unnecessary delay, act on same and issue license certificates to the successful candidates signed by each member of the Board; and the Board of Podiatry Examiners shall report annually to each licensed podiatrist in the State of North Carolina.

(b) The Board may waive the administration of a written examination prepared by it for all initial applicants who have successfully completed the National Board of Podiatry Examination. The Board may administer to such applicants and require them to complete successfully an examination to test clinical competency in the practice of podiatry.

(c) Any applicant who fails to pass his examination shall within one year be entitled to reexamination upon the payment of an amount not to exceed two hundred dollars (\$200.00), but not more than two reexaminations shall be allowed any one applicant prior to filing a new application. Should he fail to pass his third examination, he shall file a new application before he can again be examined. (1919, c. 78, s. 4; C. S., s. 6767; 1963, c. 1195, s. 2; 1967, c. 1217, s. 5; 1975, c. 672, s. 1; 1981, c. 659, ss. 3, 4; 1983, c. 217, s. 6.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsections (b) and (c).

The 1983 amendment, effective April 22,

1983, substituted "two hundred dollars (\$200.00)" for one hundred dollars (\$100.00)" in the first sentence of subsection (c).

§ 90-202.7. Applicants licensed in other states.

If an applicant for licensure is already licensed in another state to practice podiatry, the Board shall issue a license to practice podiatry to the applicant upon evidence that:

- (1) The applicant is currently an active, competent practitioner in good standing; and
- (2) The applicant has practiced at least three years out of the five years immediately preceding his or her application; and
- (3) The applicant currently holds a valid license in another state; and
- (4) No disciplinary proceeding or unresolved complaint is pending anywhere at the time a license is to be issued by this State; and
- (5) The licensure requirements in the other state are equivalent to or higher than those required by this State, and the licensure requirements of that other state grant similar reciprocity to podiatrists licensed in North Carolina.

Any license issued upon the application of any podiatrist from any other state shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Podiatry Examiners upon examination of applicants, and the rights and privileges to practice the

profession of podiatry under any license so issued shall be subject to the same duties, obligations, restrictions and conditions as imposed by this Article on podiatrists originally examined by the North Carolina State Board of Podiatry Examiners. (1919, c. 78, s. 6; C. S., s. 6768; 1967, c. 1217, s. 6; 1975, c. 672, s. 1; 1981, c. 659, s. 5; 1983, c. 217, s. 7.)

Effect of Amendments. — The 1981 amendment rewrote this section, which formerly pertained to reexamination of unsuccessful applicants.

The 1983 amendment, effective April 22,

1983, inserted "and the licensure requirements of that other state grant similar reciprocity to podiatrists licensed in North Carolina" at the end of subdivision (5).

§ 90-202.8. Revocation of certificate; grounds for; suspension of certificate.

(a) The North Carolina State Board of Podiatry Examiners, in accordance with Chapter 150A (Administrative Procedure Act) of the General Assembly, shall have the power and authority to:

- (1) Refuse to issue a license to practice podiatry;
- (2) Refuse to issue a certificate of renewal of a license to practice podiatry;
- (3) Revoke or suspend a license to practice podiatry; and
- (4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

- (1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
- (2) Is a chronic or persistent user of alcohol intoxicants or habit-forming drugs or narcotics to the extent that the same impairs his ability to practice podiatry;
- (3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
- (4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
- (5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
- (6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
- (7) Is mentally, emotionally, or physically unfit to practice podiatry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice podiatry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
- (8) Has advertised services in a false, deceptive, or misleading manner;
- (9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of podiatry or in attempting to fraudulently obtain a license to practice podiatry;
- (10) Has engaged in such immoral conduct as to discredit the podiatry profession;

- (11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
 - (12) Has been negligent in the practice of podiatry;
 - (13) Is not professionally competent in the practice of podiatry;
 - (14) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
 - (15) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
 - (16) Has committed any fraudulent or misleading acts in the practice of podiatry;
 - (17, (18) Repealed by Session Laws 1981, c. 659, s. 7.
 - (19) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of podiatry;
 - (20) Has persistently maintained, in the practice of podiatry, unsanitary offices, practices, or techniques;
 - (21) Is a menace to the public health by reason of having a serious communicable disease;
 - (22) Has distributed or caused to be distributed any intoxicant, drug, or narcotic for any other than a lawful purpose; or
 - (23) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.
- (a1) The Board shall establish a grievance committee to receive complaints concerning a practitioner's business or professional practices. The committee shall consider all complaints and determine whether there is probable cause. After its review, the committee may dismiss any complaint when it appears that probable cause of a violation cannot be established. Complaints which are not dismissed shall be referred to the Board.
- (1919, c. 78, ss. 12, 13; C. S., s. 6772; 1953, c. 1041, ss. 17, 18; 1963, c. 1195, s. 2; 1967, c. 691, s. 45; 1973, c. 1331, s. 3; 1975, c. 672, ss. 1, 2; 1981, c. 659, ss. 6-8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amend-

ment rewrote subdivision (8) of subsection (a), which pertained to solicitation of professional patronage, deleted subdivisions (17) and (18) of subsection (a) and added subsection (a1).

§ 90-202.12. Free choice by patient guaranteed.

CASE NOTES

Freedom of Choice Subject to Hospital's Staff Privilege Standards. — The right to enjoy hospital staff privileges is not absolute; it is subject to the standards set by the hospital's governing body. This is implicit in the language of this section, especially in view of the policy of this State as currently stated by § 131-126.11A. This section does not require a hospital to grant staff privileges regardless of

the standards set by its board of trustees which are reasonably related to the operation of the hospital. Generally, the protection offered by this section is for patients to have the freedom to choose a qualified "provider of care or service." *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901, cert. denied & appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

§ 90-202.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1975, c. 672, s. 1; 1981, c. 659, s. 9.)

Effect of Amendments. — The 1981 amendment added the second sentence.

CASE NOTES

Cited in Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42 (1981).

ARTICLE 13A.

Practice of Funeral Service.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-210.18. Construction of Article; State Board; members; election; qualifications; term; vacancies.

(b) The North Carolina Board of Mortuary Science is created as a continuation of the North Carolina Board of Embalmers and Funeral Directors. The Board is the agency for regulation of the practice of funeral service in this State. The Board shall have seven members as follows:

- (1) Four funeral service licensees or persons holding both funeral director's license and an embalmer's license,
- (2) Two persons holding a funeral director's license or a funeral service license, and
- (3) One public member.

A member's term shall be three years and shall expire on December 31 or when his successor has been duly elected or appointed. No member may serve more than two complete consecutive terms.

The six seats on the Board for licensees shall be filled in an election in which every person licensed to practice embalming, funeral directing, or funeral service in this State may vote. No licensee may be nominated, elected, or serve unless he holds a North Carolina license in the class designated for the seat and unless he is engaged in full-time employment in this State in a practice authorized by his license. Any vacancy occurring in an elective seat on the Board shall be filled for the unexpired term by majority vote of the remaining Board members.

The public member of the Board shall have full voting authority. He shall be appointed by the Governor and may neither be licensed under this Article nor employed by a person who is. A vacancy occurring in the public member's seat shall be filled for the unexpired term by the Governor.

(c) Nominations and elections of members of the North Carolina State Board of Mortuary Science shall be as follows:

- (1) An election shall be held each year to elect two persons for membership on the Board of Mortuary Science, each to take office on the first day of January following the election. If in any year the election of a member of the Board is not completed by January 1, the member elected that year shall take office immediately after completion of the election.
- (2) Every embalmer, funeral director and funeral service licensee with a current North Carolina license shall be eligible to vote in all elections. The holding of such a license to practice in North Carolina shall constitute registration to vote in such elections. The list of licensed embalmers, funeral directors and funeral service licensees shall constitute the registration list for elections.
- (3) All elections shall be conducted by the State Board of Mortuary Science which is hereby constituted a Board of Mortuary Science Elections. If a member of the State Board of Mortuary Science whose position is to be filled at any election is nominated to succeed himself and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Mortuary Science Elections for that election and the remaining members of the Board of Mortuary Science Elections shall proceed and function without his participation.
- (4) Nomination of candidates for election shall be made to the Board of Mortuary Science Elections by a written petition signed by not less than 20 embalmers, funeral directors or funeral service licensees licensed to practice in North Carolina, and filed with said Board of Mortuary Science Elections subsequent to the fifteenth day of May of the year in which the election is to be held and not later than midnight of the fifteenth day of August of such year, or not later than such earlier date (not before July 1) as may be set by the Board of Mortuary Science Elections: Provided, that not less than 10 days' notice of such earlier date shall be given to all embalmers, funeral directors and funeral service licensees qualified to sign a petition of nomination.
- (5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Mortuary Science Elections or its designated secretary at any time prior to the closing of the polls in any election.
- (5a) Repealed by Session Laws 1983, c. 69, s. 3, effective March 14, 1983.
- (6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Mortuary Science Elections shall prescribe, ballots containing identification of the seats for election and, in alphabetical order, the names of all nominees for each seat. Each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Mortuary Science Elections at such time as may be fixed by the Board of Mortuary Science Elections a ballot and a return official envelope addressed to said Board shall be mailed to each embalmer, funeral director and funeral service licensee licensed to practice in North Carolina, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope
Signature of Voter
Address of Voter
.

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)." The Board of Mortuary Science Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless within the time hereinafter provided it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

- (7) The date and hour fixed by the Board of Mortuary Science Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.
- (8) The said ballots shall be canvassed by the Board of Mortuary Science Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed embalmer, funeral director or funeral service licensee may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: Provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.
- (9) If one of the nominees shall receive a majority of the votes cast, he shall be declared elected. If no candidate shall receive a majority of the votes cast, the said Board shall order a second election to determine a contest between the two candidates receiving the highest number of votes. In any election if there is a tie between candidates, the tie shall be resolved by the vote of the State Board of Mortuary Science, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.
- (10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements.

- (11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations, because of lack of plural or proper nominations, or death, or withdrawal, or disqualification or any other reason, there shall be (i) only one candidate for a position, he shall be declared elected by the Board of Mortuary Science Elections, or (ii) no candidate for a position, the position shall be filled by the State Board of Mortuary Science. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the State Board of Mortuary Science. In the event of the death or resignation of a member of the State Board of Mortuary Science, after taking office, his position shall be filled for the unexpired term by the State Board of Mortuary Science.
 - (12) An official list of all licensed embalmers, funeral directors and funeral service licensees shall be kept at an office of the Board of Mortuary Science Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed embalmer, funeral director or funeral service licensee. As soon as the voting in any election begins, a list of the licensed embalmers, funeral directors, and funeral service licensees shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.
 - (13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Mortuary Science Elections for a period of six months following the close of an election.
 - (14) From any decision of the Board of Mortuary Science Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes of North Carolina.
 - (15) The Board of Mortuary Science Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed embalmers, funeral directors, and funeral service licensees.
- (1901, c. 338, ss. 1-3; Rev., s. 4384; C.S., s. 6777; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1; 1957, c. 1240, s. 1; 1965, c. 630, s. 1; 1973, c. 476, s. 128; 1975, c. 571; 1979, c. 461, ss. 1-4; 1983, c. 69, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983, c. 69, s. 6, provides: "Notwithstanding Section 1 of this act:

"(a) The term of the funeral director or funeral service licensee to be elected in 1983 shall be two years. Thereafter the term shall be three years.

"(b) The term of the public member to be appointed in 1985 shall expire on December 31, 1988. Thereafter the term shall be three years.

"(c) Members currently serving on the Board may complete their terms and shall be eligible for election to one additional consecutive term. When the term of the funeral service licensee

member expires on December 31, 1984, that seat shall be eliminated.

"Notwithstanding Section 2 of this act, only one member shall be elected to the Board in 1984."

Effect of Amendments. —

The 1983 amendment, effective March 14, 1983, rewrote subsection (b) and subdivision (c)(1), deleted subdivision (c)(5a), and in subdivision (c)(6) divided the former first sentence into the present first and second sentences and substituted the language "containing identification of the seats for election and, in alphabetical order, the names of all nominees for each seat" for "containing, in alphabetical order, the names of all nominees; and."

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

- (1) To be licensed for the practice of funeral directing under this Article, a person must:
 - a. Be at least 18 years of age,
 - b. Be of good moral character,
 - c. Have completed a minimum of 32 semester hours or 48 quarter hours of academic instruction in a duly accredited college or university, or be a graduate of a mortuary science college approved by the Board,
 - d. Have completed 12 months of resident traineeship as funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
 - e. Have passed an oral or written funeral director examination on the following subjects:
 1. Basic health sciences, including microbiology, hygiene, and public health,
 2. Funeral service administration, including psychology, funeral principles and directing, and
 3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.
- (2) To be licensed for the practice of embalming under this Article, a person must:
 - a. Be at least 18 years of age,
 - b. Be of good moral character,
 - c. Be a graduate of a mortuary science college approved by the Board,
 - d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
 - e. Have passed an oral or written embalmer examination on the following subjects:
 1. Basic health sciences, including anatomy, chemistry, microbiology, pathology and forensic pathology,
 2. Funeral service sciences, including embalming and restorative art, and
 3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.
- (3) To be licensed for the practice of funeral service under this Article, a person must:
 - a. Be at least 18 years of age,
 - b. Be of good moral character,
 - c. Be a graduate of a mortuary science college approved by the Board,
 - d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and
 - e. Have passed an oral or written funeral service examination on the following subjects:
 1. Basic health sciences, including anatomy, chemistry, microbiology, pathology, forensic pathology hygiene and public health,

2. Funeral service sciences, including embalming and restorative art,
3. Funeral service, administration including psychology, funeral principles and directing, and
4. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

- (4) a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.
- b. When a resident trainee leaves the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.
- c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval, without payment of an additional fee.
- d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than one time. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A penalty, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties. No credit shall be allowed for the 12-month period of resident traineeship that shall have been completed more than three years preceding the examination for a license.
- e. All registered resident trainees shall report to the Board at least every three months during traineeship upon forms provided by the Board listing the work which has been completed during the preceding three months of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:
 1. For funeral director trainees, the conduct of any funerals during the relevant time period,

2. For embalming trainees, the embalming of any bodies during the relevant time period,
 3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.
- f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:
1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,
 2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
 3. That the funeral service trainee has, under supervision assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.
- g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.
- h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.
- i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.
- (5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

The holder of any license issued by the Board who shall fail to renew same on or before January 31 of the calendar year for which such license is to be renewed shall be deemed to have forfeited and surrendered such license as of such date. No license so forfeited and surrendered shall be reinstated by the Board except upon application in writing within five years following such forfeiture and upon payment of all delinquent annual renewal fees plus a reinstatement fee; provided, however, that the Board may waive the provisions of this section for the holder of any license during the period of service in the armed services of the United States upon application within six months of severance therefrom.

All licensees now or hereafter licensed in North Carolina shall take courses of study in subjects relating to the practice of the profession for which they are licensed, to the end that new techniques, scientific and clinical advances, the achievements of research and the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at

least five hours of continuing education courses, approved by the Board prior to enrollment; except that for renewals for calendar year 1980 the required length of study shall be a total of 15 hours in the three years immediately preceding January 1, 1980.

The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who have been licensed in North Carolina for a continuous period of 25 years or more.

The Board shall cause to be established and offered to the licensees, each calendar year, at least five hours of continuing education courses in subjects encompassing the license categories of embalming, funeral directing and funeral service. The Board may charge licensees attending these courses a reasonable registration fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor receive a license as a funeral service licensee.

(e) Revocation; Suspension; Compromise; Disclosure. —

(1) Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the following acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license, in accordance with the procedures set out in Chapter 150A:

- a. Conviction of a felony or a crime involving fraud or moral turpitude;
- b. Fraud or misrepresentation in obtaining or renewing a license or in the practice of funeral service;
- c. False or misleading advertising as the holder of a license;
- d. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this paragraph shall not be construed to prohibit general advertising by the licensee;
- e. Employment directly or indirectly of any resident trainee agent, assistant or other person, on a part-time or full-time basis, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee;
- f. The direct or indirect giving of certificates of credit or the payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business;
- g. Gross immorality, including being under the influence of alcohol or drugs while practicing funeral service;

- h. Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee;
- i. Using profane, indecent or obscene language in the presence of a dead human body, and within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;
- j. Violating or cooperating with others to violate any of the provisions of this Article or of the rules and regulations of the Board;
- k. Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies;
- l. Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to the custody thereof;
- m. Knowingly making any false statement on a certificate of death;
- n. Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.

In any case in which the Board is entitled to suspend, revoke or refuse to renew a license, the Board may accept from the licensee an offer in compromise to pay a penalty of not more than one thousand dollars (\$1,000). The Board may either accept a compromise or revoke or refuse to renew a license, but not both.

- (2) Where the Board finds that a licensee is guilty of one or more of the acts or omissions listed in subsection (e)(1) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150A.

No person licensed under this Article shall remove or cause to be embalmed a dead human body when he has information indicating crime or violence of any sort in connection with the cause of death, nor shall a dead human body be cremated, until permission of the State or county medical examiner has first been obtained. However, nothing in this Article shall be construed to alter the duties and authority now vested in the office of the coroner.

No funeral service establishment shall accept a dead human body from any public officer (excluding the State or county medical examiner or his agent), or employee or from the official of any institution, hospital or nursing home, or from a physician or any person having a professional relationship with a decedent, without having first made due inquiry as to the desires of the next of kin and of the persons who may be chargeable with the funeral expenses of such decedent. If any such kin be found, his or her authority and directions shall govern the disposal of the remains of such decedent. Any funeral service establishment receiving such remains in violation hereof shall make no charge for any service in connection with such remains prior to delivery of same as stipulated by such kin; provided, however, this section shall not prevent any funeral service establishment from charging and being reimbursed for services rendered in connection with the removal of the remains of any deceased person in case of accidental or violent death, and rendering necessary professional services required until the next of kin or the persons chargeable with the expenses have been notified.

When and where a licensee presents a selection of funeral merchandise to the public to be used in connection with the service to be provided by the licensee or an establishment as licensed under this Article, a card or brochure shall be directly associated with each item of merchandise setting forth the price of the service using said merchandise and listing the services and other merchandise included in the price, if any. When there are separate prices for the merchan-

dis and services, such cards or brochures shall indicate the price of the merchandise and of the items separately priced.

At the time funeral arrangements are made and prior to the time of rendering the service and providing the merchandise, a funeral director or funeral service licensee shall give or cause to be given to the person or persons making such arrangements a written statement duly signed by a licensee of said funeral establishment showing the price of the service as selected and what services are included therein, the price of each of the supplemental items of services or merchandise requested, and the amounts involved for each of the items for which the funeral establishment will advance moneys as an accommodation to the person making arrangements, insofar as any of the above items can be specified at that time. The statement shall have printed, typed or stamped on the face thereof: "This statement of disclosure is provided pursuant to the requirements of North Carolina G.S. 90-210.25(e)."

(f) **Unlawful Practices.** — If any person shall practice or hold himself out as practicing the profession or art of embalming, funeral directing or practice of funeral service without having complied with the licensing provisions of this Article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than six months, or both, in the discretion of the court.

Whenever it shall appear to the Board that any person, firm or corporation has violated, threatens to violate or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain these practices. If upon application the court finds that any provision of this Article is being violated, or a violation is threatened, the court shall issue an order restraining and enjoining the violations, and this relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this subsection. The venue for actions brought under this subsection shall be the superior court of any county in which the acts are alleged to have been committed or in the county where the defendant in the action resides. (1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C. S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, ss. 2, 2½; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21; 1981, c. 619, ss. 1-4; 1983, c. 69, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1983, c. 69, s. 6, provides: "Notwithstanding Section 1 of this act:

"(a) The term of the funeral director or funeral service licensee to be elected in 1983 shall be two years. Thereafter the term shall be three years.

"(b) The term of the public member to be appointed in 1985 shall expire on December 31, 1988. Thereafter the term shall be three years.

"(c) Members currently serving on the Board may complete their terms and shall be eligible for election to one additional consecutive term. When the term of the funeral service licensee member expires on December 31, 1984, that seat shall be eliminated.

"Notwithstanding Section 2 of this act, only one member shall be elected to the Board in 1984."

Effect of Amendments. — The 1981 amendment added the last sentence of subdivision (a)(4)d, deleted "Fines" following "Suspension" in the heading of subsection (e), added "or in the practice of funeral service" in subdivision (e)(1)b and added the second paragraph of subsection (f).

The 1983 amendment, effective March 14, 1983, added the last paragraph of subdivision (e)(1).

Legal Periodicals. — For a comment on the statutory standard of care for North Carolina Health Care Providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-210.28. Fees.

The Board may set and collect fees, not to exceed the following amounts:

Establishment permit	
Application	\$ 50.00
Annual renewal	50.00
Late renewal penalty	35.00
Courtesy card	
Application	35.00
Annual renewal	35.00
Out-of-state licensee	
Application	50.00
Embalmer, funeral director, funeral service	
Application	50.00
Annual renewal	50.00
Reinstatement fee	100.00
Resident trainee permit	
Application	35.00
Annual renewal	10.00
Late renewal penalty	5.00
Duplicate license certificate	15.00

(1979, c. 461, s. 22; 1981, c. 619, s. 5.)

Effect of Amendments. — The 1981 amendment added the fee for duplicate license certificates.

ARTICLE 14B.

Disposition of Unclaimed Bodies.

§§ 90-216.6 to 90-216.11: Repealed by Session Laws 1983, c. 891, s. 3, effective January 1, 1984.

Cross References. — As to disposition of unclaimed bodies, see now § 130A-415 et seq.

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended

by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

ARTICLE 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

§ 90-216.12: Repealed by Session Laws 1983, c. 891, s. 4, effective January 1, 1984.

Cross References. — As to the final disposition or transportation of deceased migrant agricultural workers and their dependents, see now § 130A-417 et seq.

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to

the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising

under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

ARTICLE 15.

Autopsies.

§§ 90-217 to 90-220: Repealed by Session Laws 1983, c. 891, s. 5, effective January 1, 1984.

Cross References. —

As to autopsies, see now § 130A-398 et seq.

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended

by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

ARTICLE 15A.

Uniform Anatomical Gift Act.

§§ 90-220.1 to 90-220.11: Repealed by Session Laws 1983, c. 891, s. 6, effective January 1, 1984.

Cross References. — As to the Uniform Anatomical Gift Act, see now § 130A-402 et seq.

Editor's Note. — Session Laws 1983, c. 891, s. 16, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any

provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

ARTICLE 15A.

Uniform Anatomical Gift Act.

§ 90-220.1. Definitions.

Cross References. — As to corneal tissue removal, see §§ 130-202.8, 130-202.9.

§ 90-220.10. Use of tissue declared service; standard of care; burden of proof.

CASE NOTES

Cited in *Preston v. Thompson*, 53 N.C. App. 290, 280 S.E.2d 780 (1981).

ARTICLE 16.

*Dental Hygiene Act.***Repeal of Article. —**

Session Laws 1981, c. 824, s. 4 amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-221. Definitions.

(f) "Supervision" as used in this Article shall mean that acts are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control and approval. (1945, c. 639, s. 1; 1971, c. 756, s. 1; 1981, c. 824, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added subsection (f).

§ 90-233. Practice of dental hygiene.

(a) A dental hygienist may practice only under the supervision of one or more licensed dentists. Provided, however, that this subsection (a) shall be deemed to be complied with in the case of dental hygienists employed by the Department of Human Resources and especially trained by said Department as public health hygienists while performing their duties in the public schools under the direction of a duly licensed dentist.

(b) A dentist in private practice may not employ more than two dental hygienists at one and the same time who are employed in clinical dental hygiene positions.

(1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128; 1981, c. 824, ss. 2, 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment deleted "direct" preceding "supervision" in the first sentence of subsection (a), deleted "dental" following "health" and substituted

"in" for "within" in the second sentence of subsection (a) and substituted "two" for "one" and "who are employed in clinical dental hygiene positions" for "except when permitted to do so by the rules and regulations of the Board" in subsection (b).

ARTICLE 17.

*Dispensing Opticians.***Repeal of Article. —**

Session Laws 1981, c. 600, s. 21, amended
 § 143-34.12 (codified from Session Laws 1977,
 c. 712, s. 3, as amended) so as to eliminate the

provision repealing this Article. Section
 143-34.12 was itself repealed by Session Laws
 1981, c. 932, s. 1.

§ 90-236.1. Requirements for filling contact lens prescriptions.

No person, firm or corporation licensed or registered under this Article shall fill a prescription or dispense lenses, other than spectacle lenses, unless the prescription specifically states on its face that the prescriber intends it to be for contact lenses and includes the type and specifications of the contact lenses being prescribed. No person, firm or corporation licensed under this Article shall fill a prescription beyond the expiration date stated on the face thereof.

Any person, firm or corporation that dispenses contact lenses on the prescription of a practitioner licensed under Articles 1 or 6 of this Chapter shall, at the time of delivery of the lenses, inform the recipient both orally and in writing that he return to the prescriber for insertion of the lens, instruction on lens insertion and care, and to ascertain the accuracy and suitability of the prescribed lens. The statement shall also state that if the recipient does not return to the prescriber after delivery of the lens for the purposes stated above, the prescriber shall not be responsible for any damages or injury resulting from the prescribed lens, except that this sentence does not apply if the dispenser and the prescriber are the same person.

Prescriptions filled pursuant to this section shall be kept on file by the prescriber and the person filling the prescription for at least 24 months after the prescription is filled. (1981, c. 600, s. 1.)

§ 90-237. Qualifications for dispensing opticians.

In order to be issued a license as a registered licensed optician by the North Carolina State Board of Opticians, the applicant:

- (1) Shall not have violated this Article or the rules of the Board;
- (2) Shall be at least 18 years of age and a high school graduate or equivalent;
- (3) Shall have passed an examination conducted by the Board to determine his or her fitness to engage in the business of a dispensing optician; and
- (4) Shall have completed a six-month internship by working full time under the supervision of a licensed optician, optometrist or physician trained in ophthalmology, in order to demonstrate proficiency in the areas of measurement of the face, and fitting and adjusting glasses and frames to the face, lens recognition, lens design, and prescription interpretation. (1951, c. 1089, s. 4; 1977, c. 755, s. 2; 1981, c. 600, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

There is hereby created a North Carolina State Board of Opticians whose duty it shall be to carry out the purposes and enforce the provisions of this Article. The Board shall consist of seven members appointed by the Governor as follows:

- (1) Five licensed dispensing opticians, each of whom shall serve three-year terms;
- (2) Two residents of North Carolina who are not licensed as dispensing opticians, physicians, optometrists, who shall serve three-year terms.

Each member of the Board shall serve until his successor is appointed and qualifies; provided that no person shall serve on this Board for more than two complete consecutive terms. Each member of the Board, before entering upon his duties, shall take all oaths prescribed for other State officers in the manner provided by law, which oaths shall be filed in the office of the Secretary of State. The Governor, at his option, may remove any member of the Board for good cause shown, may appoint members to fill unexpired terms, and must make optician appointments from a list of three nominees for each vacancy submitted by the Board as a result of an election conducted by the Board in May of each year and open to all licensees. (1951, c. 1089, s. 5; 1979, c. 533; 1981, c. 600, s. 3.)

Effect of Amendments. — The 1981 amendment substituted "seven" for "six" in the second sentence of the introductory paragraph, inserted "licensed" and substituted "three-year terms" for "a five-year term" in subdivision (1), deleted two former sentences at the end of that subdivision which provided for appointments by the Governor to fill vacancies created by expiration of terms, rewrote subdivision (2), which formerly provided for one resident of North Carolina not licensed to practice

opticianry to serve a four-year term, substituted "Each" for "The members" and "his" for "their" in the second sentence of the second paragraph, deleted "respectively" preceding "take" and "taken and" preceding "prescribed" and inserted "oaths" following "which" in the same sentence. The amendment also substituted "may" for "and" following "shown" in the third sentence of the second paragraph and added the language following "terms" in that sentence.

§ 90-239. Organization, meetings and powers of Board.

Within 30 days after appointment of the Board, the Board shall hold its first regular meeting, and at said meeting and annually thereafter shall choose from among its members a chairman, vice-chairman, a secretary and a treasurer. The Board may combine the offices of secretary and treasurer. The Board shall make such rules and regulations not inconsistent with the law as may be necessary to the proper performance of its duties, may employ agents to carry out the purposes of this Article, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board, and a majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of meeting to be designated by the chairman. Special meetings may be called by the chairman or upon request of three members. The secretary of the Board shall keep a full and complete record of its proceedings, which shall at all reasonable times be open to public inspection. (1951, c. 1089, s. 6; 1981, c. 600, ss. 4-7.)

Effect of Amendments. — The 1981 amendment substituted "from among its members a chairman, vice-chairman, a secretary and a treasurer" for "one of its members as president and one as secretary and treasurer" in the first

sentence, added the second sentence, inserted "may employ agents to carry out the purpose of this Article" in the third sentence, substituted "chairman" for "president" in the fourth sentence and added the fifth sentence.

§ 90-240. Examination.

(a) Applicants to take the examination for dispensing opticians shall be high school graduates or the equivalent who:

- (1) Have successfully completed a two-year course of training in an accredited school of opticianry with a minimum of 1600 hours or
- (2) Have completed three and one-half years of apprenticeship while registered with the Board under a licensed dispensing optician, with time spent in a recognized school credited as part of the apprenticeship period or
- (3) Have completed three and one-half years of apprenticeship while registered with the Board under the direct supervision of an optometrist or a physician specializing in ophthalmology, provided the supervising optometrist or physician elects to operate the apprenticeship under the same requirements applicable to dispensing opticians.

(b) The examination shall be confined to such knowledge as is reasonably necessary to engage in preparation and dispensing of optical devices and shall include the following:

- (1) The skills necessary for the proper analysis of prescriptions;
- (2) The skills necessary for the dispensing of eyeglasses and contact lenses; and
- (3) The processes by which the products offered by dispensing opticians are manufactured.

(c) The examination shall be given at least twice each year at sites and on dates that are publicly announced 60 days in advance.

(d) Each applicant shall, upon request, receive his or her examination score on each section of the examination.

(e) The Board may include as part or all of the examination, any nationally prepared and recognized examination, and will periodically review and validate any exam in use by the Board. The Board will credit an applicant with the score on any national test taken in the last three years to the extent such test may be included in the North Carolina exam.

(f) An applicant for admission on the basis of apprenticeship shall have worked full time under the supervision of a licensed dispensing optician, optometrist or physician trained in ophthalmology. An apprentice shall have obtained experience in ophthalmic fabricating and manufacturing techniques and processes for no less than six months and shall have gained experience in the other activities defined as dispensing herein. (1951, c. 1089, s. 7; 1977, c. 755, s. 3; 1981, c. 600, s. 8.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-241. Waiver of written examination requirements.

(a) The Board shall grant a license without examination to any applicant who holds a currently valid license as a dispensing optician issued by another state, is in good standing in such other state, has engaged in practice in such other state as a licensee for four years immediately preceding the application in this State, is at least 18 years of age, and has not violated this Article or the rules of the Board.

(b) The Board will grant admission to the next examination and grant license upon attainment of a passing score on the examination to persons from other states who are not licensed but who have worked in opticianry for four years performing tasks equivalent to the North Carolina apprenticeship, and who meet the requirements of G.S. 90-237, subsections (1), (2) and (3).

(c) Any person desiring to secure a license under this section shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-246.

(d) Upon receipt of the application described in subsection (c) above, the Board may issue a temporary license to engage in opticianry in this State. Persons issued a temporary license under this subsection may engage in opticianry in this State for not more than 60 days while awaiting a final decision on licensure by the Board. The Board shall make a final decision on licensure under this subsection not later than 60 days after receipt of the initial application. If the Board does not approve licensure under this subsection, the applicant, if operating under a temporary license, shall immediately surrender it to the Board and cease the practice of opticianry in this State. (1951, c. 1089, s. 8; 1977, c. 755, s. 4; 1979, c. 166, ss. 2, 3; 1981, c. 600, s. 9.)

Effect of Amendments. — The 1981 amendment rewrote this section, which formerly pre-

tained to registration fees as well as to licensing of opticians from outside the State.

§ 90-242: Repealed by Session Laws 1981, c. 600, s. 10.

§ 90-243. Registration of places of business, apprentices.

The Board may adopt rules requiring, as a condition of dispensing, the registration of places of business where ophthalmic dispensing is engaged in, and for registration of apprentices and interns who are working under direct supervision of a licensed optician. The Board may also require that any information furnished to it as required by law or regulation be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1; 1981, c. 600, s. 11.)

Effect of Amendments. — The 1981 amendment substituted the present first sentence for four former sentences which concerned fees for certified copies of certificates and for regis-

tering places of business and apprentices, and deleted "must" following "regulation" in the last sentence.

§ 90-244. Display, use, and renewal of license of registration.

(a) Every person to whom a license has been granted under this Article shall display the same in a conspicuous part of the office or establishment wherein he is engaged as a dispensing optician. The Board may adopt regulations concerning the display of registrations of places of business and of apprentices and interns.

(b) A license issued by the Board automatically expires on the first day of January of each year. A license may be reinstated without penalty during the month following expiration. After the end of the month, a license may be reinstated by payment of a penalty of five dollars (\$5.00) per month not to exceed the license fee itself. Licenses which remain expired two years or more may not be reinstated. (1951, c. 1098, s. 11; 1981, c. 600, s. 12.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a), substituted "license" for "certificate of

registration" in the first sentence of that subsection, added the second sentence of that subsection and added subsection (b).

§ 90-245. Collection of fees.

The secretary to the Board is hereby authorized and empowered to collect in the name and on behalf of this Board the fees prescribed by this Article and shall turn over to the State Treasurer all funds collected or received under this Article, which funds shall be credited to the North Carolina State Board of Opticians, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Article. Nothing in this Article shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from the fees collected under the provisions of this Article and received by the State Treasurer in the manner aforesaid. (1951, c. 1089, s. 12; 1981, c. 884, s. 9.)

Effect of Amendments. — The 1981 amendment deleted the former second sentence, relating to the bond of the secretary.

§ 90-246. Fees.

In order to provide the means of administering and enforcing the provisions of this Article and the other duties of the North Carolina State Board of Opticians, the Board is hereby authorized to charge and collect fees established by its rules and regulations not to exceed the following:

(1) Each examination	\$100.00
(2) Each initial license	10.00
(3) Each renewal of license	60.00
(4) Each license issued to a practitioner of another state to practice in this State	75.00
(5) Each registration of an optical place of business	20.00
(6) Each application for registration as an opticianry apprentice or intern, and renewals thereof	20.00
(7) Temporary license issued pursuant to G.S. 90-241(d)	20.00.

(1951, c. 1089, s. 13; 1977, c. 755, s. 5; 1981, c. 600, s. 13.)

Effect of Amendments. — The 1981 amendment rewrote this section, which formerly pertained to yearly licenses.

§ 90-247: Repealed by Session Laws 1981, c. 600, s. 14.

§ 90-248. Compensation and expenses of Board members and secretary.

Each member of the Board shall receive for his or her services for time actually in attendance upon Board meetings and affairs of the Board only, the amount of per diem provided by G.S. 138-5 and shall be reimbursed for subsistence, mileage and necessary expenses incurred in the discharge of such duties at the same rates as set forth in G.S. 138-6 and G.S. 138-7. (1951, c. 1089, s. 15; 1953, c. 894; 1965, c. 730; 1969, c. 445, s. 6; 1981, c. 600, s. 15.)

Effect of Amendments. — The 1981 amendment inserted "or her", deleted "the" preceding "time", inserted "and affairs of the Board only", substituted "subsistence, mileage and" for

"actual", substituted "at the same rates as set forth in G.S. 138-6 and 138-7" for "not to exceed five dollars (\$5.00) per day for subsistence plus the actual traveling expenses or an allowance

of five cents (5¢) per mile while such member uses his personally owned automobile" and deleted a second sentence which provided for compensation of the secretary.

§ 90-249. Powers of the Board.

(a) The Board shall have the power to make rules and regulations, not inconsistent with this Article and the laws of the State of North Carolina, with respect to the following areas of the business of opticianry in North Carolina:

- (1) Misrepresentation to the public;
- (2) Baiting or deceptive advertising;
- (3) Continuing education of licensees;
- (4) Location of registrants in the State;
- (5) Registration of established optical places of business, provided no rule restricting type or location of a business may be enacted;
- (6) Requiring photographs for purposes of identification of persons subject to this Article;
- (7) Content of licensure examination and re-examination;
- (8) Revocation, suspension, and reinstatement of license and reprimands;
- (9) Fees within the limits of G.S. 90-246;
- (10) Accreditation of schools of opticianry;
- (11) Registration and training of apprentices and interns;
- (12) License without examination and issuance of temporary license.

(b) The Board shall have the power to revoke, suspend or issue a reprimand with regard to any license granted by it under this Article for misconduct, gross negligence, incompetence, or violation of this Article or the rules of the Board promulgated hereunder. It shall be grounds for revocation of a license to advertise in any manner which conveys or intends to convey the impression to the public that the eyes are examined by persons licensed under this Article. Other than as expressly provided in this Article, the Board shall neither adopt nor enforce any rule, regulation or policy which prohibits advertising.

(c) Any person whose license has been revoked for any cause may, after the expiration of 90 days, and within two years from the date of revocation, apply to the Board to have the same reinstated, and upon a showing satisfactory to the Board, the license may be restored to such person.

(d) The procedure for revocation and suspension of a license or refusal to grant license or permission to sit for the examination shall be in accordance with the provisions of Chapter 150A of the General Statutes. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6; 1981, c. 600, s. 16.)

Effect of Amendments.— The 1981 amendment designated the first paragraph as subsection (a), inserted "this Article and" deleted "to empower the Board to have authority to make rules and regulations" following "Carolina" and substituted "business" for "field" in that paragraph, substituted subdivisions (a)(1) through (a)(12) for former subdivisions (1) through (14) which dealt with similar subject matter, substituted subsection (b) for two former paragraphs which pertained to the same subject matter,

designated the former fourth paragraph as subsection (c) and in that subsection substituted "license" for "certificate" following "whose" and substituted "the" for "and in the discretion of the Board, the certificate of registration or" preceding "license" near the end of the sentence, designated the last paragraph as subsection (d) and inserted "or refusal to grant license or permission to sit for the examination" in that subsection.

§ 90-252. Engaging in practice without license.

Any person, firm or corporation owning, managing or conducting a store, shop or place of business and not having in its employ and on duty, during all hours in which acts constituting the business of opticianry are carried on, a licensed dispensing optician engaged in supervision of such store, office, place

of business or optical establishment, or representing to the public, by means of advertisement or otherwise or by using the words, "optician, licensed optician, optical establishment, optical office, ophthalmic dispenser," or any combination of such terms within or without such store representing that the same is a legally established optical place of business duly licensed as such and managed or conducted by persons holding a dispensing optician's license, when in fact such permit is not held by such person, firm or corporation, or by some person employed by such person, firm or corporation and on the premises and in charge of such optical business, shall be guilty of a misdemeanor and may, upon conviction, be fined not less than one hundred dollars (\$100.00) or be imprisoned for not more than 12 months, or both, in the discretion of the court. (1951, c. 1089, s. 19; 1981, c. 600, s. 17.)

Effect of Amendments. — The 1981 amendment inserted "and on duty, during all hours in which acts constituting the business of opticianry are carried on", substituted "engaged in" for "for the", substituted "representing to the public, by means of advertising or otherwise or by using" for "including an advertisement, whether in newspaper, radio, book, magazine or other printed matter",

inserted "ophthalmic dispenser", substituted "representing" for "as to mislead the public" following "store", substituted "and" for "or" preceding "managed", deleted "license or" preceding "permit", inserted "by" preceding "some person", substituted "employed by such person, firm or corporation and on the premises" for "in the employ" and inserted "be guilty of a misdemeanor and may."

§ 90-253. Exemptions from Article.

Nothing in this Article shall be construed to apply to optometrists, or physicians trained in ophthalmology who are authorized to practice under the laws of this State, or to an unlicensed person working within the practice and under the direct supervision of the optometrist or physician trained in ophthalmology. An apprentice or intern registered with the Board and working under direct supervision of a licensed optician, optometrist or physician trained in ophthalmology will not be deemed to have engaged in opticianry by reason of performing acts defined as preparation and dispensing, provided the apprentice is in compliance with the rules of the Board respecting the training of apprentices.

As used in this section, "supervision" means the provision of general direction and control through immediate personal on-site inspection and evaluation of all work constituting the practice of opticianry and the provision of consultation and instruction by a licensed dispensing optician, except that on-site supervision is not required for minor adjustments or repairs to eyeglasses. (1951, c. 1089, s. 20; 1981, c. 600, s. 18.)

Effect of Amendments. — The 1981 amendment rewrote this section.

§ 90-254. General penalty for violation.

Any person, firm or corporation who shall violate any provision of this Article for which no other penalty has been provided shall, upon conviction, be fined not more than two hundred dollars (\$200.00) or imprisoned for a period of not more than 12 months, or both, in the discretion of the court.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective or

whether or not criminal prosecution has been instituted or administrative sanctions imposed by reasons of the violation. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1951, c. 1089, s. 21; 1981, c. 600, s. 19.)

Effect of Amendments. — The 1981 amendment added the second paragraph.

§ 90-255. Rebates.

It shall be unlawful for any person, firm or corporation to offer or give any gift or premium or discount, directly or indirectly, or in any form or manner participate in the division, assignment, rebate or refund of fees or parts thereof with any ophthalmologist, optometrist, or wholesaler, for the purpose of diverting or influencing the freedom of choice of the consumer in the selection of an ophthalmic dispenser. (1951, c. 1089, s. 23; 1981, c. 600, s. 20.)

Effect of Amendments. — The 1981 amendment substituted the language following "thereof" for "or to engage in advertising in any form or manner that will urge the public to seek

the services of any specific professional person or group of persons engaged in the field of refraction and visual care."

ARTICLE 18A.

Practicing Psychologists.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-270.2. Definitions.

CASE NOTES

Exemption From § 90-18. — While not specifically exempted by § 90-18, a psychologist who limits himself to the practice of psychology and the rendering of professional psychological services as defined in subsections

(d) and (e) of this section is exempt from § 90-18 to that extent. *Wesley v. Greyhound Lines*, 47 N.C. App. 680, 268 S.E.2d 855, cert. denied, 301 N.C. 239, 283 S.E.2d 136 (1980).

§ 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed as limiting the activities, services, and use of official title on the part of any person in the regular employ of a federal, county or municipal government, or other political subdivision or agency thereof, or of the State Department of Public Instruction, or of a duly accredited or chartered educational institution, insofar as such activities and services are a part of the duties and responsibilities of his position. Such duties

and responsibilities may include, but are not restricted to, teaching, writing, conducting research, the giving of public speeches or lectures, the giving of legal testimony, consulting with publishers, serving on boards, commissions, and review committees of public and nonprofit private agencies, with or without remuneration so long as such activities do not involve the practice of psychology as defined in this Article.

Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, provided that the person was serving in this capacity on December 31, 1979. In addition to the requirements for licensing contained in Article 18A, an employee of a State agency or department who has served in a position involving the practice of psychology for five consecutive years by December 31, 1984, and who has graduate training in psychology and experience as the Board finds to be the equivalent of a master's degree in psychology, shall be permitted to take the examination for licensing as a psychological associate. Provided, however, that any agency or department of the State of North Carolina which employs psychologists may petition the State Personnel Commission for exemption from the requirements of this act, which exemption shall be granted upon a showing that there is an insufficient number of licensed psychologists available to fill all authorized psychologists' positions in such agency or department.

(a1) Nothing in this Article shall be construed as limiting State or local governmental programs from hiring nonlicensed applicants qualified for psychology positions, provided that the person hired makes application for a license in North Carolina within six months of being employed by the governmental program. After making application for a license, employees hired under this provision must take the first examination for a license to which they are admitted by the Board, and if the employee fails the examination, the employee must pass the examination the next time it is given to remain employed in a psychology position.

(1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1; 1981, c. 654, ss. 1, 2; 1983, c. 82, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted "the" preceding "part", substituted "the" for "such" preceding "person" and deleted "for a continuous period of five years" preceding "prior" in the first sentence of the second paragraph of subsection (a), deleted the former second sentence of such paragraph, which provided that State employees exempted from licensing

or who were unlicensed and involved in the practice of psychology or who had not practiced for five continuous years in the field of psychology would be allowed to continue in such activities until December 31, 1984, and added subsection (a1).

The 1983 amendment, effective March 21, 1983, substituted "was serving in this capacity on December 31, 1979" for "has served in this capacity prior to July 1, 1979" at the end of the first sentence of the second paragraph.

§ 90-270.6. Board of Examiners in Psychology; appointment; term of office; composition.

For the purpose of carrying out the provisions of this Article, there is created a North Carolina State Board of Examiners of Practicing Psychologists, which shall consist of seven members appointed by the Governor. At all times three members shall be licensed practicing psychologists, two members shall be licensed psychological associates, and two members shall be members of the public who are not licensed under this Article. In the event that the composi-

tion of the Board on the effective date of this act does not conform to that prescribed in the preceding sentence, such composition shall be corrected thereafter by appropriate appointments as terms expire and as vacancies occur on the Board. Due consideration shall also be given to the adequate representation of the various fields and areas of practice of psychology. Terms of office shall be three years. All terms of service on the Board expire June 30 in appropriate years. As the term of a member expires, or as a vacancy occurs for any other reason, the North Carolina Psychological Association, or its successor, shall, with the advice of the chairmen of the graduate departments of psychology in the State, for each vacancy, submit to the Governor a list of the names of three eligible persons, and from this list the Governor shall make the appointment for a full term, or for the remainder of the unexpired term, if any. Each Board member shall serve until his successor has been appointed. The Governor shall appoint the two public members on July 1, 1983. One member shall serve an initial term of two years and one member shall serve an initial term of three years. Thereafter all terms shall be for three years. As the term of a public member expires, or if one should become vacant for any reason, the Governor shall appoint a new public member within 60 days of the vacancy's occurring. No member, either public or licensed under this Article, shall serve more than two complete consecutive terms. (1967, c. 910, s. 6; 1977, c. 670, s. 5; 1979, c. 670, s. 3; c. 1005, s. 2; 1983, c. 82, ss. 1-3.)

Effect of Amendments. —

The 1983 amendment, effective March 21, 1983, deleted "hereby" preceding "created" and substituted "seven members appointed" for "five members to be appointed" in the first sen-

tence, rewrote the second sentence, which formerly provided for three members to be licensed practicing psychologists and two members to be licensed psychological examiners [associates], and added the last four sentences.

§ 90-270.11. Licensing and examination.

(a) **Practicing Psychologist. —**

- (1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars (\$50.00) and an additional examination fee of not more than one hundred twenty dollars (\$120.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

- a. Is at least 18 years of age;
- b. Is of good moral character;
- c. Has received his doctoral degree based on a planned and directed program of studies, the content of which was psychological in nature, from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his area of practice as a psychologist;
- d. Has not within the preceding six months failed an examination given by the Board.

- (2) In order for a psychological associate to be upgraded to a practicing psychologist, the applicant must comply with the requirements set forth in subdivision (1) hereof; however, a not more than one hundred twenty dollar (\$120.00) examination fee only shall be required.

(b) **Psychological Associate. —**

- (1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars (\$50.00) and an additional examination fee of not more than one hundred twenty dollars (\$120.00), who passes a satisfactory examination in psychology, and

who submits evidence verified by oath and satisfactory to the Board that he:

- a. Is at least 18 years of age;
- b. Is of good moral character;
- c. Has received a master's degree in psychology from an accredited educational institution;
- d. Has not within the preceding six months failed an examination given by the Board.

(2) The Board shall not prescribe any educational requirements other than the master's degree in psychology required by this subsection.

(1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 670, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176; 1981, c. 738, ss. 1, 2; 1983, c. 37, ss. 1, 2; c. 82, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendment. — The 1981 amendment substituted "sixty dollars (\$60.00)" for "fifty dollars (\$50.00)" following "examination fee of" in subdivisions (a)(1) and (b)(1) and substituted "sixty dollar (\$60.00)" for "fifty dollar (\$50.00)" in subdivision (a)(2).

The first 1983 amendment, effective

February 25, 1983, substituted "18" for "21" in subdivisions (a)(1)a and (b)(1)a.

The second 1983 amendment, effective March 21, 1983, substituted "not more than one hundred twenty dollars (\$120.00)" for "sixty dollars (\$60.00)" in subdivisions (a)(1) and (b)(1) and substituted "one hundred twenty dollar (\$120.00)" for "sixty dollar (\$60.00)" in subdivision (a)(2).

§ 90-270.19. Injunctive authority.

The Board may apply to the superior court for an injunction to prevent violations of this Article or of any rules enacted pursuant thereto. The court is empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. (1983, c. 82, s. 6.)

Editor's Note. — Session Laws 1983, c. 82, s. 7, makes this section effective upon ratification. The act was ratified on March 21, 1983.

§§ 90-270.20 to 90-270.23: Reserved for future codification purposes.

ARTICLE 18B.

Physical Therapy.

Repeal of Article. — Session Laws 1981, c. 765, s. 2, amended § 143-34.12 (codified from Session Laws 1977, c. 712, § 3, as amended) so as to eliminate the

provision repealing this Article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of eight members, including one medical doctor licensed and residing in North Carolina, four physical therapists, two physical therapists assistants, and one public member. The public member shall be appointed by the Governor and shall be a person who is not licensed under Chapter 90 who shall represent the interest of the public at large. The medical doctor, physical therapists, and the physical therapists assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following the use of a nomination procedure made available to all physical therapists and physical therapists assistants licensed and residing in North Carolina. The records of the operation of the nomination procedure shall be filed with the Board, to be available for a period of six months following nomination, for reasonable inspection by any licensed practitioner. Each physical therapist member of the Board shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist immediately preceding his appointment and shall be actively engaged in the practice of physical therapy in North Carolina during his incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist assistant immediately preceding his appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during his incumbency.

Members shall be appointed to serve three year terms, or until their successors are appointed, to commence on January 1, in respective years; provided that members of the Board on July 1, 1979, shall continue to serve for the remainder of their terms, respectively, or until their successors are appointed. In the event that a member of the Board for any reason shall become ineligible to or cannot complete his term of office, another appointment shall be made by the Governor in accordance with the procedure stated above to fill the remainder of the term. No member may serve for more than two successive three-year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary-treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487; 1981, c. 765, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 82.)

Effect of Amendments. — The 1981 amendment substituted "eight" for "seven" and inserted "and one public member" in the first sentence of the first paragraph, added the second sentence of that paragraph, substituted "the use of a nomination procedure made available to" for "a poll of" in the third sentence of that paragraph and added the fourth, fifth, and sixth sentences of that paragraph.

The 1981 (Reg. Sess., 1982) amendment (the Separation of Powers Act of 1982) deleted the former fifth and sixth sentences of the first paragraph, which read: "One physical therapist member shall be appointed by the Lieutenant Governor and one by the Speaker of the House.

The Lieutenant Governor and Speaker of the House, respectively, shall fill the first and second vacancies in physical therapist members of the Board arising by expiration of term after July 1, 1981, and shall continue to appoint their respective successors; the Governor shall fill all other vacancies arising by expiration of term."

Session Laws 1981 (Reg. Sess., 1982), c. 1191, s. 83, provides: "Appointments made under the previous G.S. 90-270.25 are valid until the expiration of the term, or death, resignation or removal of the appointee, but no new appointment may be made which would increase the membership of the Board to more than eight."

ARTICLE 18C.

*Marital and Family Therapy Certification Act.***§ 90-270.53. Application for certificate without examination before July 1, 1982.**

Any person who applies on or before July 1, 1982, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he either:

(1) Meets educational and experience qualifications as follows:

a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marriage or family therapy or a degree in an allied mental health field or shall be a clergyman or a physician whose official transcripts establish that he has completed an appropriate course of study in an allied mental health field. In addition, an applicant meets the educational requirements by presenting satisfactory evidence of post-master's or post-doctoral training taken in the field of marital and family therapy or counseling from an educational or training institution or program recognized by the Board notwithstanding the fact that such training was taken at a nondegree granting institution or in a nondegree program, provided that such training, by itself or in combination with any training received as part of the program leading to a degree from a recognized educational institution, is the equivalent in content and quality, as defined in the duly adopted rules and regulations of the Board, of a master's or doctoral degree in marital and family therapy and counseling.

b. Experience requirements: At least 3,000 hours of clinical experience in the practice of marital and family therapy, not more than 500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 2,500 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied mental health field; or

(2) Was certified prior to July 1, 1982, in this State in an allied mental health profession and satisfies the educational requirements for certification as a certified marital and family therapist set forth in (1)a., of this section. (1979, c. 697, s. 1; 1981, c. 611, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "July 1, 1982" for "January 1, 1981" in two places and added the last sentence of subdivision (1)a.

§ 90-270.54. Application for certificate by examination.

Any person who applies to the Board after January 1, 1981, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he:

(1) Meets educational and experience qualifications as follows:

a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marital and family therapy or counseling, or a degree in an allied mental health field, which degree is evidenced

by the applicant's official transcripts which establish that he has completed an appropriate course of study in an allied mental health field. In addition, an applicant meets the educational requirements by presenting satisfactory evidence of post-master's or post-doctoral training taken in the field of marital and family therapy or counseling from an educational or training institution or program recognized by the Board notwithstanding the fact that such training was taken at a nondegree granting institution or in a nondegree program, provided that such training, by itself or in combination with any training received as part of the program leading to a degree from a recognized educational institution, is the equivalent in content and quality, as defined in the duly adopted rules and regulations of the Board, of a master's or doctoral degree in marital and family therapy and counseling.

- b. Experience requirements: At least 1,500 hours of clinical experience in the practice of marital and family therapy, not more than 500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 1,000 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied mental health field (with ongoing supervision consistent with standards approved by the Board); and

(1979, c. 697, s. 1; 1981, c. 611, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added the last sentence of subdivision (1)a.

ARTICLE 19.

Sterilization Operations.

§ 90-272. Operation on unmarried minor.

CASE NOTES

Cited in *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981).

ARTICLE 20.

Nursing Home Administrator Act.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

Session Laws 1981, c. 722, ss. 1 and 2, transferred this Article from the list of statutes

repealed effective July 1, 1981, under § 143-34.12, to § 143-34.13, which makes the repeal effective July 1, 1983. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-276. Definitions.

For the purposes of this Article and as used herein:

- (1) "Administrator-in-training" means an individual registered with the Board who serves a training period under the supervision of a preceptor.
- (2) "Board" means the North Carolina State Board of Examiners for Nursing Home Administrators.
- (3) "Nursing home" means any institution or facility defined as such for licensing purposes under G.S. 130-9(e) of the General Statutes, whether proprietary or nonprofit, including but not limited to nursing homes owned or administered by the federal or State government or any agency or political subdivision thereof and nursing homes operated in combination with a home for the aged or any other facility.
- (4) "Nursing home administrator" means a person who administers, manages, supervises, or is in general administrative charge of a nursing home, whether such individual has an ownership interest in such home and whether his functions and duties are shared with one or more individuals.
- (5) "Preceptor" means a person who is a licensed and registered nursing home administrator and meets the requirements of the Board to supervise administrators-in-training during the training period. (1969, c. 843, s. 1; 1981, c. 722, s. 3; 1981 (Reg. Sess., 1982), c. 1234, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, deleted the second sentence of subdivision (2), which provided that this article should not apply to institutions run by religious groups which depended solely upon spiritual means through prayer for healing and that no license was required of individuals responsible for the organization or administration of such an institution.

The 1981 (Reg. Sess., 1982) amendment rewrote this section, adding subdivision (1) and changing the designations of former subdivisions (1) through (3) accordingly, adding subdivision (5), and substituting "G.S. 130-9(e)" for "G.S. 130-9(c)" near the beginning of subdivision (3).

§ 90-277. Composition of Board.

There is created the State Board of Examiners for Nursing Home Administrators. The Board shall consist of seven members. The seven members shall be voting members and shall meet the following criteria:

- (1) All shall be individuals representative of the professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients.
- (2) Less than a majority of the Board members shall be representative of a single profession or institutional category.
- (3) Three of the Board members shall be licensed nursing home administrators, and shall be considered as representatives of institutions in construing this section.
- (4) Four of the Board members shall be public, noninstitutional members, with no direct financial interest in nursing homes.
- (5) The terms of the Board members shall be limited to two consecutive terms.

Effective July 1, 1973, the Governor shall appoint three members, one of whom shall be a licensed nursing home administrator, for terms of three years, and four members, two of whom shall be licensed nursing home administrators,

for terms of two years. Thereafter, all terms shall be three years. However, no member shall serve more than two consecutive full terms. Any vacancy occurring in the position of an appointive member shall be filled by the Governor for the unexpired term in the same manner as for new appointments. Appointive members may be removed by the Governor for cause after due notice and hearing. (1969, c. 843, s. 1; 1973, c. 728; 1981, c. 722, s. 4.)

Effect of Amendments.— The 1981 amendment, effective July 1, 1981, in the first paragraph deleted “hereby” preceding “created” in the first sentence, substituted “The Board” for “which” thereby creating the second sentence and substituted “seven” for “eight” in that sentence, deleted a former second sentence which read “The Secretary of Human Resources or his designee shall be an ex officio member who shall serve as secretary for the Board and have

no vote”, deleted “remaining” preceding “seven” and substituted “and shall” for “who” in the third sentence and substituted “All” for “They” in subdivision (1). The amendment also redesignated former subdivision (3) as subdivision (4) and rewrote that subdivision, redesignated former subdivision (4) as subdivision (3) and added the language following “administrators” in that subdivision, and added subdivision (5).

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

- (1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:
 - a. He is at least 18 years of age, of good moral character and of sound physical and mental health; and
 - b. He has successfully completed the equivalent of two years of college level study (60 semester hours or 96 quarter hours) from an accredited community college, college or university prior to application for licensure; or has completed a combination of education and experience, acceptable under rules promulgated by the Board, prior to application for licensure. Under this provision, two years of supervisory experience in a nursing home shall be equated to one year of college study; and
 - c. He has satisfactorily completed a course prescribed by the Board, which course contains instruction on the services provided by nursing homes, laws governing nursing homes, protection of patient interests and nursing home administration; and
 - d. He has successfully completed his training period as an administrator-in-training as prescribed by the Board; and
 - e. He has passed examinations administered by the Board and designed to test for competence in the subject matters referred to in paragraph c of this subdivision.
- (2) Repealed by Session Laws 1981, c. 722, s. 6.
- (3) A temporary license may be issued under requirements and conditions prescribed by the Board to any person to act or serve as administrator of a nursing home without meeting the requirements for full licensure, but only when there are unusual circumstances preventing compliance with the procedures for licensing elsewhere provided by this Article. The temporary license shall be issued by the chairman only for the period prior to the next meeting of the Board, at which time the Board may renew such temporary license for a further period only up to one year. (1969, c. 843, s. 1; 1973, c. 476, s. 128; 1981, c. 722, ss. 5-7; 1981 (Reg. Sess., 1982), c. 1234, s. 2; 1983, c. 737.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote paragraph (b) of subdivision (1) as it read prior to the 1983 amendment, deleted subdivision (2), which concern provisional licenses, and substituted "chairman" for "secretary" in subdivision (3).

The 1981 (Reg. Sess., 1982) amendment added paragraph c1 to subdivision (1) of this section as it read prior to the 1983 amendment.

The 1983 amendment, effective July 13, 1983, and applicable to license as applied for on or after that date, rewrote subdivision (1).

§ 90-279. Licensing function.

The Board shall license nursing home administrators in accordance with rules and regulations issued and from time to time revised by it. A nursing home administrator's license shall not be transferable and shall be valid until expiration or until suspended or revoked for violation of this Article or of the standards established by the Board pursuant to this Article. Denial of issuance or renewal, suspension or revocation by the Board shall be subject to the provisions of Chapter 150A of the General Statutes. (1969, c. 843, s. 1; 1973, c. 1331, s. 3.)

Editor's Note. — This section has been set out to correct an error in the replacement volume.

§ 90-280. Fees; display of license; duplicate license; inactive list.

(a) Each applicant for an examination administered by the Board and each applicant for an administrator-in-training program shall pay a fee set by the Board not to exceed two hundred dollars (\$200.00).

(b) Each person licensed as a nursing home administrator shall be required to pay a license fee in an amount set by the Board not to exceed two hundred fifty dollars (\$250.00). A license shall expire on the thirtieth day of September of the second year following its issuance and shall be renewable biennially upon payment of a renewal fee set by the Board not to exceed two hundred fifty dollars (\$250.00).

(c) Each person licensed as a nursing home administrator shall display his license certificate, along with the current certificate of renewal, in a conspicuous place in his place of employment.

(d) Any person licensed as a nursing home administrator may receive a duplicate license by payment of a fee set by the Board not to exceed twenty-five dollars (\$25.00).

(e) Any person licensed as a nursing home administrator who is not acting, serving, or holding himself out to be a nursing home administrator may have his name placed on an inactive list for such period of time not to exceed five years upon payment of a fee set by the Board not to exceed twenty-five dollars (\$25.00).

(f) Any person having a temporary license issued pursuant to G.S. 90-278(3) shall pay a fee in an amount set by the Board not to exceed one hundred dollars (\$100.00). If the Board renews the temporary license, no further fee shall be required.

(g) The Board may set fees not to exceed two hundred and fifty dollars (\$250.00) for conducting and administering initial training and continuing education courses, and may set a fee not to exceed twenty-five dollars (\$25.00) for certifying a course submitted for review by another individual or agency wishing to offer such courses. (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282; 1981 (Reg. Sess., 1982), c. 1234, s. 4; 1983, c. 215.)

Effect of Amendments. —

The 1981 (Reg. Sess., 1982) amendment substituted "an administrator-in-training program" for "a training program sponsored or supervised by the Board" and "two hundred dollars (\$200.00)" for "the cost of administering the examination or of sponsoring or supervising the training program" in subsection (a), substituted "two hundred fifty dollars (\$250.00)" for

"one hundred fifty dollars (\$150.00)" in two places in subsection (b), inserted ", along with the current certificate of renewal," in subsection (c), deleted "the amount of" preceding "twenty-five dollars (\$25.00)" at the end of subsection (e) and added subsections (f) and (g).

The 1983 amendment, effective April 22, 1983, inserted "not to exceed two hundred and fifty dollars (\$250.00)" in subsection (g).

§ 90-281. Collection of funds.

All fees and other moneys collected and received by the Board shall be handled as provided by law and as prescribed by the State Treasurer. Such funds shall be used and expended by the Board to pay the compensation and travel expenses of members and employees of the Board and other expenses necessary for the Board to administer and carry out the provisions of this Article. (1969, c. 843, s. 1; 1983, c. 913, s. 10.)

Effect of Amendments. — The 1983 amendment, effective July 22, 1983, deleted the former last sentence, which read "The financial

records of the Board shall be subjected to an annual audit, supervised by the State Auditor and paid for out of the funds of the Board."

§ 90-282: Repealed by Session Laws 1981, c. 722, s. 8, effective July 1, 1981.

§ 90-283. Organization of Board; compensation; employees and services.

The Board shall elect from its membership a chairman, vice-chairman and secretary, and shall adopt rules and regulations to govern its proceedings. Board members shall be entitled to receive only such compensation and reimbursement as is prescribed by Chapter 138 of the General Statutes for State boards generally. At any meeting a majority of the voting members shall constitute a quorum. The Board may, in accordance with the State Personnel Act, employ any necessary personnel to assist it in the performance of its duties and may contract for such services as may be necessary to carry out the provisions of this Article. (1969, c. 843, s. 1; 1981, c. 722, s. 9.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted a

comma for "and" following "chairman" and inserted "and secretary" in the first sentence.

§ 90-285. Functions and duties of the Board.

The Board shall meet at least once annually in Raleigh or any other location designated by the chairman and shall have the following functions and duties:

- (1) Develop, impose and enforce rules and regulations setting out standards which must be met by individuals in order to receive and hold a license as a nursing home administrator, which standards shall be designed to insure that nursing home administrators shall be individuals who are of good character and who are otherwise suitable, by education, training and experience in the field of institutional administration, to serve as nursing home administrators.
- (3) Issue licenses to qualified individuals.
- (11) Develop an administrator-in-training program to insure that nursing home administrators have adequate training and experience prior to licensure. (1969, c. 843, s. 1; 1981, c. 722, ss. 10, 11; 1981 (Reg. Sess., 1982), c. 1234, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "education, training and experience" for "training or experience" near the end of subdivision (1) and deleted "and for cause, after due notice and hearing, revoke, suspend, or deny renewal of licenses previously issued by the Board in any case where the individual holding such license

is determined substantially to have failed to conform to the requirements of such standards" at the end of subdivision (3).

Session Laws 1981, c. 722, s. 15, provides that "Any rules promulgated pursuant to the rule-making powers of the Board under Article 20 of Chapter 90 of the General Statutes shall be ineffective after October 1, 1981, unless readopted by the Board prior to that date."

The 1981 (Reg. Sess., 1982) amendment added subdivision (11).

§ 90-285.1. Suspension, revocation or refusal to issue a license.

The Board may suspend, revoke, or refuse to issue a license or may reprimand or otherwise discipline a licensee after due notice and an opportunity to be heard at a formal hearing, upon substantial evidence that a licensee:

- (1) Has violated the provisions of this Article or the rules adopted by the Board;
- (2) Has violated the provisions of G.S. 130-9(e) and rules promulgated thereunder;
- (3) Has been convicted of, or has tendered and has had accepted a plea of no contest to, a criminal offense showing professional unfitness;
- (4) Has practiced fraud, deceit, or misrepresentation in securing or procuring a nursing home administrator license;
- (5) Is incompetent to engage in the practice of nursing home administration or to act as a nursing home administrator;
- (6) Has practiced fraud, deceit, or misrepresentation in his capacity as a nursing home administrator;
- (7) Has committed acts of misconduct in the operation of a nursing home under his jurisdiction;
- (8) Is a habitual drunkard;
- (9) Is addicted or dependent upon the use of morphine, opium, cocaine, or other drugs recognized as resulting in abnormal behavior;
- (10) Has practiced without being registered biennially;
- (11) Has transferred or surrendered possession of, either temporarily or permanently, his license or certificate to any other person;
- (12) Has paid, given, has caused to be paid or given or offered to pay or to give to any person a commission or other valuable consideration for the solicitation or procurement, either directly or indirectly, of nursing home patronage;
- (13) Has been guilty of fraudulent, misleading, or deceptive advertising;
- (14) Has falsely impersonated another licensee;
- (15) Has failed to exercise regard for the safety, health or life of the patient;
- (16) Has permitted unauthorized disclosure of information relating to a patient or his records; or
- (17) Has discriminated among patients, employees, or staff on account of race, sex, religion, color, or national origin. (1981, c. 722, s. 12.)

Editor's Note. — Session Laws 1981, c. 722, s. 16, makes this section effective July 1, 1981.

§ 90-286. Renewal of license.

Every holder of a nursing home administrator's license shall renew it biennially by application to the Board. The Board shall grant renewals when the applicant has paid the fee required by this Article and has satisfactorily completed continuing education courses as may be prescribed by the Board, unless the Board finds that the applicant has acted or failed to act in such a manner as would constitute grounds for suspension, revocation or denial of a license as provided by this Article. The Board shall adopt rules defining the content of continuing education courses approved or required by it under this section and shall make a copy of these rules available to each licensee. The Board shall not require any licensee to successfully complete more than 30 hours of continuing education courses every two years. The Board shall certify and administer continuing education courses for nursing home administrators and shall keep a record of the courses successfully completed by each licensee. (1969, c. 843, s. 1; 1981, c. 722, s. 13; 1983, c. 72.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the last two sentences.

Session Laws 1981, c. 722, s. 14, provides that "Any rule promulgated pursuant to G.S. 90-286

regarding the imposition of continuing education requirements is hereby repealed."

The 1983 amendment, effective Oct. 1, 1983, rewrote this section.

ARTICLE 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

Repeal of Article. —

Session Laws 1981, c. 572, s. 8, amended § 143-34.13 (codified from Session Laws 1977, c. 712, § 4, as amended) so as to eliminate the

provision repealing this article. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90-294. License required; Article not applicable to certain activities.

(b) No person may practice or hold himself out as being able to practice speech and language pathology or audiology in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board as provided in this Article or holds a current, unsuspended, unrevoked license of endorsement pursuant to G.S. 90-297. The license required by this section shall be kept conspicuously posted in such person's office or place of business at all times. Nothing in this Article, however, shall be considered to prevent a qualified person licensed in this State under any other law from engaging in the profession for which such person is licensed.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests and whose work is under the supervision of a physician, consulting physician, or licensed audiologist.

(1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "G.S. 90-297" for "G.S.

90-296" in the first sentence of subsection (b) and deleted "in industrial operations" following "tests" and "company" following "supervision of a" in subsection (f).

§ 90-296. Examinations.

Editor's Note. — Session Laws 1981, c. 572, s. 3, effective June 15, 1981, amends subsection (a) of this section. The section, as amended, is

not set out since the section, as amended, appears exactly as set forth in the 1981 replacement volume.

§ 90-301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150A, for any of the following causes:

(1975, c. 773, s. 1; 1981, c. 572, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment made a minor technical change in the introductory paragraph.

§ 90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of seven members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a certificate of clinical competence in audiology of the American Speech and Hearing Association. Two members shall have paid work experience in speech pathology for at least five years and hold a certificate of clinical competence in speech pathology of the American Speech and Hearing Association. One member shall be physician who is licensed to practice medicine in the State of North Carolina. Two members shall be appointed by the Governor to represent the interest of the public at large. These two members shall be neither licensed speech and language pathologists nor audiologists. These members shall be appointed not later than July 1, 1981; one shall be initially appointed for a term of two years; the other shall be appointed for a term of three years. Thereafter all public members shall serve three-year terms.

(c) The initial Board shall have members appointed for terms of one year, two years, three years, four years, and five years. All board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive three-year terms.

(1975, c. 773, s. 1; 1981, c. 572, ss. 5, 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "seven" for "five" in the first sentence of subsection (a), added the last four

sentences of subsection (a), and substituted the last two sentences of subsection (c) for a sen-

tence which read "Thereafter, Board members shall be appointed for a term of five years."

§ 90-304. Powers and duties of Board.

(a) The powers and duties of the Board are as follows:

- (1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.
- (2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.
- (3) To adopt responsible rules and regulations including but not limited to regulations which establish ethical standards of practice and to amend or repeal the same.
- (4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.
- (5) To employ such personnel as determined by its needs and budget.
- (6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses.

(b) The board shall not adopt or enforce any rule or regulation which prohibits advertising except for false or misleading advertising. (1975, c. 773, s. 1; 1981, c. 572, s. 7.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsection (b).

ARTICLE 23.

Right to Natural Death; Brain Death.

§ 90-320. General purpose of Article.

(a) The General Assembly recognizes as a matter of public policy that an individual's rights include the right to a peaceful and natural death and that a patient or his representative has the fundamental right to control the decisions relating to the rendering of his own medical care, including the decision to have extraordinary means withheld or withdrawn in instances of a terminal condition. This Article is to establish an optional and nonexclusive procedure by which a patient or his representative may exercise these rights.

(1977, c. 815; 1979, c. 715, s. 1; 1983, c. 313, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 amendment, effective May 16,

1983, rewrote subsection (a).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-321. Right to a natural death.

(c) The attending physician may rely upon a signed, witnessed, dated and proved declaration:

- (1) Which expresses a desire of the declarant that no extraordinary means be used to prolong his life if his condition is determined to be terminal and incurable; and
- (2) Which states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the extraordinary means; and
- (3) Which has been signed by the declarant in the presence of two witnesses who believe the declarant to be of sound mind and who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse, (ii) do not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon his death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provides, (iii) are not the attending physician, or an employee of the attending physician, or an employee of a health facility in which the declarant is a patient, or an employee of a nursing home or any group-care home in which the declarant resides, and (iv) do not have a claim against any portion of the estate of the declarant at the time of the declaration; and
- (4) Which has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d) below.

(d) The following form is specifically determined to meet the requirements above:

"Declaration Of A Desire For A Natural Death"

"I,, being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.

"This the day of
Signature"

"I hereby state that the declarant,, being of sound mind signed the above declaration in my presence and that I am not related to the declarant by blood or marriage and that I do not know or have a reasonable expectation that I would be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act if the declarant died on this date without a will. I also state that I am not the declarant's attending physician or an employee of the declarant's attending physician, or an employee of a health facility in which the declarant is a patient or an employee of a nursing home or any group-care home where the declarant resides. I further state that I do not now have any claim against the declarant.

Witness
Witness"

The clerk or the assistant clerk, or a notary public may, upon proper proof, certify the declaration as follows:

"Certificate"

"I,, Clerk (Assistant Clerk) of Superior Court or Notary Public (circle one as appropriate) for County hereby certify that, the declarant, appeared before me and swore to me and to the witnesses in my presence that this instrument is his Declaration Of A Desire For A Natural Death, and that he had willingly and voluntarily made and executed it as his free act and deed for the purposes expressed in it.

"I further certify that and, witnesses, appeared before me and swore that they witnessed, declarant, sign the attached declaration, believing him to be of sound mind; and also swore that at the time they witnessed the declaration (i) they were not related within the third degree to the declarant or to the declarant's spouse, and (ii) they did not know or have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it provides at that time, and (iii) they were not a physician attending the declarant or an employee of an attending physician or an employee of a health facility in which the declarant was a patient or an employee of a nursing home or any group-care home in which the declarant resided, and (iv) they did not have a claim against the declarant. I further certify that I am satisfied as to the genuineness and due execution of the declaration.

"This the day of

Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as appropriate)
for the County of"

The above declaration may be proved by the clerk or the assistant clerk, or a notary public in the following manner:

- (1) Upon the testimony of the two witnesses; or
- (2) If the testimony of only one witness is available, then
 - a. Upon the testimony of such witness, and
 - b. Upon proof of the handwriting of the witness who is dead or whose testimony is otherwise unavailable, and
 - c. Upon proof of the handwriting of the declarant, unless he signed by his mark; or upon proof of such other circumstances as will satisfy the clerk or assistant clerk of the superior court, or a notary public as to the genuineness and due execution of the declaration.
- (3) If the testimony of none of the witnesses is available, such declaration may be proved by the clerk or assistant clerk, or a notary public
 - a. Upon proof of the handwriting of the two witnesses whose testimony is unavailable, and
 - b. Upon compliance with paragraph c of subdivision (2) above.

Due execution may be established, where the evidence required above is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

The testimony of a witness is unavailable within the meaning of this subsection when the witness is dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify.

If the testimony of one or both of the witnesses is not available the clerk or the assistant clerk, or a notary public or superior court may, upon proper proof, certify the declaration as follows:

"Certificate"

"I, Clerk (Assistant Clerk) of Court for the Superior Court or Notary Public (circle one as appropriate) of County hereby certify that based upon the evidence before me I am satisfied as to the genuineness and due execution of the attached declaration by, declarant, and that the declarant's signature was witnessed by, and, who at the time of the declaration met the qualifications of G.S. 90-321(c)(3).

"This the day of,

.
Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as appropriate) for County."

(1977, c. 815; 1979, c. 112, ss. 1-6; 1981, c. 848, ss. 1-3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment inserted "who believe the declarant to be of sound mind and" near the beginning of subdivision (c)(3), deleted "and" preceding clauses (ii) and (iii) of that subdivision, inserted "do not know or have a reasonable expectation that they" and deleted "not" following "would" in clause (ii) of the subdivision, inserted "or" following the first use of the word "physician" and inserted "an employee" preceding "of a health facility" and preceding "of a nursing home" in clause (iii) of the subdivision and substituted "do not have" for "is not a person who has" in clause (iv) of the subdivision. The amendment inserted "being of sound mind" and "that I do not know or have a reasonable expectation that" and deleted "not" following "would" in the first sentence of the "Declaration Of A Desire For A Natural Death" in subsection

(d). In the first "Certificate" in subsection (d), the amendment substituted "the declarant" for "and, witnesses", inserted the language beginning "to me" at the end of the first paragraph, created the second paragraph by inserting the language beginning "I further certify" and ending "me and swore", inserted "believing him to be of sound mind" in the introductory clause of the second paragraph, inserted "they did not know or have a reasonable expectation that" and deleted "not" following "would" in clause (ii) of that paragraph and inserted "an employee" preceding "of a health facility" and preceding "of a nursing home" in clause (iii) of that paragraph.

Session Laws 1981, c. 848, s. 4 provides that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 90-322. Procedures for natural death in the absence of a declaration.

(a) If a person is comatose and there is no reasonable possibility that he will return to a cognitive sapient state or is mentally incapacitated, and:

- (1) It is determined by the attending physician that the person's present condition is:
 - a. Terminal; and
 - b. Incurable; and
 - c. Irreversible; and
- (2) There is confirmation of the person's present condition as set out above in this subsection, in writing by a physician other than the attending physician; and
- (3) A vital function of the person could be restored by extraordinary means or a vital function of the person is being sustained by extraordinary means;

then, extraordinary means may be withheld or discontinued in accordance with subsection (b).

(b) If a person's condition has been determined to meet the conditions set forth in subsection (a) and no instrument has been executed as provided in G.S.

90-321 the extraordinary means to prolong life may be withheld or discontinued upon the direction and under the supervision of the attending physician with the concurrence (i) of the person's spouse, or (ii) of a guardian of the person, or (iii) of a majority of the relatives of the first degree, in that order. If none of the above is available then at the discretion of the attending physician the extraordinary means may be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) Repealed by Session Laws 1979, c. 715, s. 2.

(d) The withholding or discontinuance of such extraordinary means shall not be considered the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. (1977, c. 815; 1979, c. 715, s. 2; 1981, c. 848, s. 5; 1983, c. 313, ss. 2-4; c. 768, s. 5.1.)

Effect of Amendments. — The 1981 amendment inserted "or is mentally incapacitated" in the first sentence of subsection (a), inserted "could be restored by extraordinary means or a vital function of the person" in subdivision (a)(3), inserted "withheld or" in the last phrase of subsection (a) and in the first sentence of subsection (b), and inserted "withholding or" in the first sentence of subsection (d).

Session Laws 1981, c. 848, s. 4, provides that the act does not affect the validity of any "Declaration Of A Desire For A Natural Death" executed prior to the effective date of the act.

The first 1983 amendment, effective May 16, 1983, substituted "in writing by a physician other than the attending physician" for "by a majority of a committee of three physicians" in

subdivision (a)(2), substituted "with the concurrence" for "at the request" in the first sentence of subsection (b), and in the second sentence of subsection (b) substituted "is available" for "are available" and inserted "withheld or" following "extraordinary means may be."

The second 1983 amendment, effective July 15, 1983, deleted "other than the attending physician" following "physician" in subdivision (a)(2), so as to eliminate duplication of that language, resulting from the first 1983 amendment.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 90-323. Death; determination by physician.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§§ 90-324 to 90-328: Reserved for future codification purposes.

ARTICLE 24.

Registered Practicing Counselors.

§ 90-329. Declaration of policy.

It is declared to be the public policy of this State that the activities of persons using the title "Registered Practicing Counselor" be regulated to insure the protection of the public health, safety and welfare. (1983, c. 755, s. 1.)

Editor's Note. — Session Laws 1983, c. 755, s. 3, provides: "Nothing herein contained shall be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act."

Session Laws 1983, c. 755, s. 4, provides: "For the purposes of the appointment of the initial Board and of administrative preparation for the implementation of this Article, this act shall become effective July 1. 1983. For all other

purposes, this act shall become effective January 1, 1984."

§ 90-330. Definitions; practice of law; practice of marriage and family therapy.

(a) Definitions. As used in this Article certain terms are defined as follows:

- (1) A "counselor" is a person engaged in the practice of counseling who is not a Registered Practicing Counselor as defined in this Article.
- (2) A "Registered Practicing Counselor" is a person engaged in the practice of counseling who holds a certificate as a Registered Practicing Counselor issued to him under the provisions of this Article.
- (3) The "practice of counseling" means holding oneself out to the public as a practicing counselor offering counseling services which include, but are not limited to the following:
 - a. Counseling. Assisting an individual, through the counseling relationship, to develop understanding of personal problems, to define goals and to plan action reflecting his or her interests, abilities, aptitudes and needs as these are related to personal-social concerns, education progress and occupations and careers.
 - b. Appraisal Activities. Administering and interpreting tests for assessment of personal characteristics.
 - c. Consulting. Interpreting scientific data and providing guidance and personnel services to individuals, groups or organizations.
 - d. Referral Activities. Identifying problems requiring referral to other specialists.
 - e. Research Activities. Designing, conducting and interpreting research with human subjects.

(b) Practice of Law. Nothing in this Article shall be construed as authorizing Registered Practicing Counselors to engage in the practice of law, and such person shall not engage in the practice of law unless duly licensed so to do.

(c) Practice of Marriage and Family Therapy, Psychology or Social Work. No person hereafter registered as a Practicing Counselor under the provisions of this Article shall be allowed to hold himself out to the public as having specialized training or experience as an expert or specializing in the field of Marriage and Family Therapy, Psychology or Social Work unless specifically authorized by other provisions of law. (1983, c. 755, s. 1.)

§ 90-331. Unlawful use of title "Registered Practicing Counselor."

It shall be unlawful for any person who has not received a certificate of qualification as a Registered Practicing Counselor to assume or use such a title, or to use any words or other means of identification indicating that the person has been certified as a Registered Practicing Counselor, but such person may use the term "counselor" in connection with his name relating to his services as a counselor. (1983, c. 755, s. 1.)

§ 90-332. Use of title by firm.

It shall be unlawful for any firm, partnership, corporation, association or other business or professional entity to assume or use the title of Registered Practicing Counselor, unless each of the members of such firm, partnership or association first shall have received a certificate of qualification from the State Board of Registered Practicing Counselors. (1983, c. 755, s. 1.)

§ 90-333. North Carolina Board of Registered Practicing Counselors; appointments; terms; composition.

(a) For the purpose of carrying out the provisions of this Article, there is hereby created the North Carolina Board of Registered Practicing Counselors which shall consist of seven members appointed by the Governor in the manner hereinafter prescribed. The Governor may remove any member of the Board for neglect of duty or malfeasance or conviction of a felony or other crime of moral turpitude, but for no other reason.

(b) At least five members of the Board shall be Registered Practicing Counselors except that initial appointees shall be persons who meet the educational and experience requirements for registration as Registered Practicing Counselors under the provisions of this Article; and two members shall be appointed from the public at large. Composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State of North Carolina.

(c) At all times the Board shall include at least two counselors primarily engaged in counselor education, at least one counselor primarily engaged in the public sector, and at least two counselors primarily engaged in the private sector.

(d) All members of the Board shall be residents of the State of North Carolina, and after the establishment of the initial Board, all members, with the exception of the public members shall be registered by the Board under the provisions of this Article. Professional members of the Board must be actively engaged in the practice of counseling or in the education and training of students in counseling, and have been for at least three years prior to their appointment to the Board. Such activity during the two years preceding the appointment shall have occurred primarily in this State.

(e) The term of office of each member of the Board shall be three years; provided, however, that of the members first appointed, three shall be appointed for terms of one year, two for terms of two years, and two for terms of three years. No member shall serve more than two consecutive three-year terms.

(f) Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.

(g) Members of the Board shall receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Article, at the rates prescribed in G.S. 93B-5.

(h) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, the necessary personnel for the performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983, c. 755, s. 1.)

§ 90-334. Functions and duties of the Board.

(a) The Board shall administer and enforce the provisions of this Article.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates under this Article, and shall issue a certificate to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Article from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) The Board shall establish and receive fees not to exceed seventy-five dollars (\$75.00) for initial or renewal application, not to exceed seventy-five dollars (\$75.00) for examination, and not to exceed fifteen dollars (\$15.00) for late renewal; maintain Board accounts of all receipts, and make expenditures from board receipts for any purpose which is reasonable and necessary for the proper performance of its duties under this Article.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for registration and certificate renewal, including but not limited to the power to adopt or use examination materials and accreditation standards of any recognized counselor accrediting agency and the power to establish reasonable standards for continuing counselor education; provided that for certificate renewal no examination shall be required.

(h) Subject to the provisions of Chapter 150A of the General Statutes, the Board shall have the power to adopt, amend, or repeal rules and regulations to carry out the purposes of this Article, including but not limited to the power to adopt ethical and disciplinary standards.

(i) The Board shall not adopt rules to regulate individuals who do not use the title "Registered Practicing Counselor." (1983, c. 755, s. 1.)

§ 90-335. Board general provisions.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes. (1983, c. 755, s. 1.)

§ 90-336. Title and qualifications for registration.

(a) Each person desiring to be registered by the Board shall make application to the Board upon such forms and in such manner as the Board shall prescribe, together with the required application fee established by the Board.

(b) The Board shall issue a certificate as "Registered Practicing Counselor" to an applicant who:

- (1) Holds a Master's degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, and
- (2) Has a degree including a concentration in subject matter directly related to the practice of counseling as defined in G.S. 90-330(a)(3) or a degree supplemented with courses that the Board determines to be substantially equivalent, and
- (3) Provides satisfactory evidence of the completion of two years' experience in the practice of counseling under the direct supervision of a Registered Practicing Counselor. A doctoral degree in counseling from an accredited college or university may be substituted for two years of experience. (1983, c. 755, s. 1.)

§ 90-337. Persons certified in other states.

A counselor who holds a valid and unrevoked certificate as a Registered Practicing Counselor, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides within the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Registered Practicing Counselors and comply with its rules regarding such registration. Such person may use the term "Counselor" in connection with his name, but may not use the term "Registered Practicing Counselor" without registering with the Board. (1983, c. 755, s. 1.)

§ 90-338. Temporary exemption from academic qualifications.

Applicants who were engaged in the practice of counseling before January 1, 1984, shall be exempt from the academic qualifications required by this Article for Registered Practicing Counselors and shall be registered upon passing the Board examination and meeting the experience requirements. (1983, c. 755, s. 1.)

§ 90-339. Renewal of certificates of registration.

(a) All certificates of registration shall be effective upon date of issuance by the Board, and shall expire on the second June 30 thereafter.

(b) All certificates of registration issued hereunder shall be renewed at the times and in the manner provided by this section. At least 45 days prior to expiration of each certificate of registration, the Board shall mail a notice for certificate renewal to the person certified for the current certification period. At least 10 days before the current certificate expires, the applicant must return the notice properly completed, together with a renewal fee established by the Board, upon receipt of which the Board shall issue to the person to be registered the renewed certificate of registration for the period stated on the said certificate.

(c) Any person certified who allows his certificate to lapse for failure to apply for renewal within 45 days after notice shall be subject to a late renewal fee as established herein. Failure to apply for renewal of a certificate of registration within one year after the certificate's expiration date will require that a certificate of registration be reissued only upon application as for an original certificate. (1983, c. 755, s. 1.)

§ 90-340. Disciplinary procedures.

The Board may, in accordance with the provisions of Chapter 150A of the General Statutes, refuse to grant or to renew, may suspend, or may revoke the certificate of any person certified under this Article on the following grounds:

- (1) Conviction of a misdemeanor under this Article; or
- (2) Conviction of a felony under the laws of the United States or of any state of the United States; or
- (3) Gross unprofessional conduct, dishonest practice or incompetence in the practice of counseling; or
- (4) Procuring or attempting to procure a certificate of registration by fraud, deceit, or misrepresentation; or
- (5) Any fraudulent or dishonest conduct in counseling; or
- (6) Inability of the person to perform the functions for which a certificate of registration has been issued due to impairment of mental or physical faculties; or

- (7) Violations of any of the provisions of this Article or rules of the Board.
(1983, c. 755, s. 1.)

§ 90-341. Violation a misdemeanor.

Any person violating any provision of this Article is guilty of a misdemeanor and, upon conviction thereof, may be punishable by fine, by imprisonment, or by both fine and imprisonment. (1983, c. 755, s. 1.)

§ 90-342. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person from violating the prohibitions of this Article. The Board shall not be required to post bond in connection with such proceeding. (1983, c. 755, s. 1.)

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 1.

Sanitarians.

Sec.

90A-1 to 90A-13. [Repealed.]

Article 2.

Certification of Water Treatment Facility Operators.

90A-21. Water Treatment Facility Operators Board of Certification.

90A-22. Classification of water treatment facilities; notification of users.

90A-25. Issuance of certificates.

90A-26. Revocation or suspension of certificate.

90A-27. Application fee.

90A-29. Certified operators required.

90A-30. Penalties; remedies; contested cases.

90A-31 to 90A-34. [Reserved.]

Article 3.

Certification of Wastewater Treatment Plant Operators.

90A-42. Fees.

90A-45. Commercial wastewater treatment operation firms.

90A-46 to 90A-49. [Reserved.]

Article 4.

Registrations of Sanitarians.

90A-50. State Board of Sanitarian Examiners.

Sec.

90A-51. Definitions.

90A-52. Practice without certificate unlawful.

90A-53. Qualifications and examination for registration as a sanitarian.

90A-54. Qualification for registration as a sanitarian intern.

90A-55. State Board of Sanitarian Examiners; appointment and term of office.

90A-56. Compensation of Board members; expenses; employees.

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90A-58. Applicability of Chapter 93B.

90A-59. Record of proceedings; register of application; register of registered sanitarians and sanitarian interns.

90A-60. Rating of educational institutions.

90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.

90A-62. Certification and registration of sanitarians certified in other states.

90A-63. Renewal of certificates.

90A-64. Suspensions and revocations of certificates.

90A-65. Representing oneself as a registered sanitarian.

90A-66. Violations; penalty; injunction.

ARTICLE 1.

Sanitarians.

§§ 90A-1 to 90A-13: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1274, s. 1, effective October 1, 1982.

Cross References. — For present provisions as to registration of sanitarians, see § 90A-50 et seq.

Editor's Note. — This Article was also tentatively repealed by Session Laws 1977, c. 712,

as amended, effective July 31, 1981, but the repeal provided for in the 1977 act was itself repealed by Session Laws 1981, c. 932, s. 1.

Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 3, contains a severability clause.

ARTICLE 2.

*Certification of Water Treatment Facility Operators.***Repeal of Article. —**

Session Laws 1981, c. 616, s. 12, amended § 143-34.12 (codified from Session Laws 1977, c. 712, s. 3, as amended) so as to eliminate the

provision repealing this article. Section 143-34.12 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90A-21. Water Treatment Facility Operators Board of Certification.

(a) Board Membership. — There is hereby established within the Department of Human Resources a Water Treatment Facility Operators Board of Certification (hereinafter termed the "Board of Certification") composed of eight members to be appointed by the Governor as follows:

- (1) One member who is currently employed as a water treatment facility operator;
- (2) One member who is manager of a North Carolina municipality using a surface water supply;
- (3) One member who is manager of a North Carolina municipality using a treated groundwater supply;
- (4) One member who is employed as a director of utilities, water superintendent, or equivalent position with a North Carolina municipality;
- (5) One member employed by a private water utility or private industry and who is responsible for the operation or supervision of a water supply and treatment facility;
- (6) One member who is a faculty member of a four-year college or university whose major field is related to water supply;
- (7) One member employed by the Department of Human Resources and working in the field of water supply;
- (8) One member not certified or regulated under this Article, who shall represent the interest of the public at large.

(b) Terms of Office. — All members serving on the Board on June 30, 1981, shall complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that the member employed by the Department of Human Resources may serve more than two consecutive terms, and except that each member shall serve until his successor is appointed and qualifies. The Governor may remove any member for good cause shown and shall appoint members to fill unexpired terms. The Governor shall appoint the public member not later than July 1, 1981.

(d) Compensation. — Members of the Board of Certification who are officers or employees of State agencies or institutions shall receive subsistence and travel allowances at the rates authorized by G.S. 138-5.

(e) Officers. — The Board shall elect a chairman and all other necessary officers to serve one-year terms. A majority of the members of the Board shall constitute a quorum for the transaction of business.

(f) Annual Report. — The Board shall report annually to the Governor a full statement of its disciplinary and enforcement programs and activities during the year, together with such recommendations as it may deem expedient. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 1-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment substituted "eight" for "seven" and "Governor" for "Secretary of Human Resources" in the introductory sentence of subsection (a),

deleted "and" at the end of subdivision (a)(6), substituted a semi-colon for "who shall serve as chairman of the Board of Certification" at the end of subdivision (a)(7) and added subdivision (a)(8). The amendment also rewrote subsections (b) and (d) and added subsections (e) and (f).

§ 90A-22. Classification of water treatment facilities; notification of users.

(a) On or before July 1, 1982, the Board of Certification, with the advice and assistance of the Secretary of Human Resources, shall classify all surface water treatment facilities and all facilities for treating groundwater supplies that are used, or intended for use, as part of a public water supply system with due regard for the size of the facility, its type, character of water to be treated, other physical conditions affecting the treatment of the water, and with respect to the degree of skill, knowledge, and experience that the operator responsible for the water treatment facility must have to supervise successfully the operation of the facilities so as to adequately protect the public health.

(b) The Board shall notify users of such facilities when any classification of a facility by the Board would result in a certified operator's not being required to supervise the operation of that facility. Any user so notified may demand a hearing before the Board on its decision, and that hearing and any appeal therefrom shall be conducted in accordance with Articles 3 and 4 of Chapter 150A of the General Statutes. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, s. 6.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a), added "On or before July 1, 1982" at the

beginning of subsection (a), and added subsection (b).

§ 90A-25. Issuance of certificates.

(d) Certificates in an appropriate grade will be issued without examination to any person or persons certified by the governing board in the case of a city, town, county, sanitary district, or other political subdivision, or by the owner in the case of a private utility or industry, to have been in responsible charge of its water treatment facilities on the date the Board of Certification notifies the governing board, or owner, of the classification of its water treatment facility, provided the facility was classified before July 1, 1981, and provided the application for such certification is made within one year of the date of notification. A certificate so issued will be valid for use by the holder only in the water treatment facility in which he was employed at the time of his certification. No certificate shall be issued under this subsection to any operator of any water treatment facility classified by the board on or after July 1, 1981.

(e) Temporary certificates in any grade may be issued without examination to any person employed as a water treatment facility operator when the Board of Certification finds that the supply of certified operators, or persons with training necessary to certification, is inadequate. Temporary certificates shall be valid for only one year. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board of Certification may deem necessary to protect the public health. No temporary certificate may be renewed more than one

time either by any operator at the same grade level or by any operator for employment at the same water treatment facility. (1969, c. 1059, s. 2; 1973, c. 476, s. 128; 1981, c. 616, ss. 7, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in subsection (d), substituted "provided the facility was classified before July 1, 1981

and provided" for "and if" in the first sentence and added the last sentence. In subsection (e), the amendment deleted "but may be renewed" at the end of the second sentence and added the last sentence.

§ 90A-26. Revocation or suspension of certificate.

The Board of Certification, in accordance with the procedure set forth in Chapter 150A of the General Statutes of North Carolina, may singly or in combination, issue a reprimand to, or revoke or suspend the certificate of an operator when it is found that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 2; 1973, c. 1331, s. 3; 1981, c. 616, s. 9.)

Effect of Amendments. — The 1981 amendment substituted the language beginning

"singly" and ending "certificate of" for the words "revoke the certificate of."

§ 90A-27. Application fee.

(a) The Board of Certification, in establishing procedures for receiving applications for certification, shall impose fees, or schedules of fees, adequate to meet the anticipated costs of administering the classification and certification programs.

(b) In establishing procedures for receiving renewal applications, the Board of Certification may establish fees or a schedule of fees, adequate to meet the anticipated costs of renewal of certification, not to exceed fifty dollars (\$50.00) per license. (1969, c. 1059, s. 2; 1981, c. 562, s. 1.)

Effect of Amendments. — The 1981 amendment designated the former section as subsection (a) and added subsection (b).

Session Laws 1981, c. 562, s. 10, contains a severability clause.

§ 90A-29. Certified operators required.

(a) On and after July 1, 1971, every person, firm, or corporation, municipal or private, owning or having control of a water treatment facility shall have the obligation of assuring that the operator in responsible charge of such facility is duly certified by the Board of Certification under the provisions of this Article.

(b) No person, after July 1, 1971, shall perform the duties of an operator, in responsible charge of a water treatment facility, without being duly certified under the provisions of this Article. (1969, c. 1059, s. 2; 1981, c. 616, s. 10.)

Effect of Amendments. — The 1981 amendment added the subsection designations (a) and (b).

§ 90A-30. Penalties; remedies; contested cases.

(a) Upon the recommendation of the Board of Certification, the Secretary of Human Resources or a delegated representative may impose an administrative, civil penalty on any person, firm or corporation who violates G.S. 90A-29(a). Each day of a continued violation shall constitute a separate violation. The penalty shall not exceed one hundred dollars (\$100.00) for each day such violation continues. No penalty shall be assessed until the person alleged to be in violation has been notified of the violation.

(b) Any person wishing to contest a penalty issued under this section shall be entitled to an administrative hearing and judicial review conducted according to the procedures outlined in G.S. 150A-23 through G.S. 150A-52.

(c) The Secretary may bring a civil action in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the administrative penalty whenever an owner or person in control of a water treatment facility

(1) Who has not requested an administrative hearing fails to pay the penalty within 60 days after being notified of such penalty, or

(2) Who has requested an administrative hearing fails to pay the penalty within 60 days after service of a written copy of the decision as provided in G.S. 150-36.

(d) Notwithstanding any other provision of law, this section imposes the only penalty or sanction, civil or criminal, for violations of G.S. 90A-29(a) or for the failure to meet any other legal requirement for a water system to have a certified operator in responsible charge. (1981, c. 616, s. 11.)

Editor's Note. — The reference in subdivision (c)(2) to § 150-36 was apparently intended to refer to § 150A-36.

§§ 90A-31 to 90A-34: Reserved for future codification purposes.

ARTICLE 3.

Certification of Wastewater Treatment Plant Operators.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.

Repeal of Article. —

The provision of Session Laws 1977, c. 712, as

amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 90A-42. Fees.

The Wastewater Treatment Plant Operators Certification Commission, in establishing procedures or implementing the requirements of this Article, shall impose the following schedule of fees:

(7) Annual Fee, five dollars (\$5.00);

(8) Replacement of Certificate, five dollars (\$5.00);

(9) Late Payment of Annual Fee, five dollars (\$5.00), in addition to the regular fee called for in (7) hereinabove; and

(10) Mailing List Fees, upon request for mailing lists of wastewater treatment plant operators and/or plants, shall be made available upon payment of fees at a rate of five dollars (\$5.00) per 100 names of certified operators and/or facilities, with a minimum payment of fifty dollars (\$50.00).

(1969, c. 1059, s. 3; 1979, c. 554, s. 5; 1981, c. 361, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment it is not set out.

Effect of Amendments. — The 1981 amendment deleted "Renewal" preceding "Fee" in subdivision (7), deleted "and" at the end of sub-

division (8), substituted "Late Payment" for "Reinstatement of Operator Certification after lapse for nonpayment" and deleted "Renewal" following "Annual" and "regular" in subdivision (9) and added subdivision (10).

§ 90A-45. Commercial wastewater treatment operation firms.

(a) Every person, firm, or corporation, municipal or private, owning or having control of a wastewater treatment works may contract with a responsible commercial wastewater treatment works operation firm for operational and other services of that firm, and that firm shall designate an employee as the operator in responsible charge. Such designee and other licensed employees of the first shall be responsible for the total operation and maintenance of the wastewater treatment works. Contractual firms shall not be limited as to the number of facilities, distance between facilities, location of office or residence, frequency of visits, utilization of local persons who are not certified, or other internal management procedures.

(b) Any employee designated by the firm as operator in responsible charge must obtain certification from the Wastewater Treatment Plant Operators Certification Commission and must comply with all of the requirements specified in Chapter 90A and the rules and reasonable standards of the Commission, applicable to all operators in responsible charge, designed to assure satisfactory operation of wastewater facilities. (1983, c. 489.)

Editor's Note. — Session Laws 1983, c. 489, s. 2, makes this section effective on ratification. The act was ratified June 10, 1983.

§§ 90A-46 to 90A-49: Reserved for future codification purposes.

ARTICLE 4.

Registrations of Sanitarians.

§ 90A-50. State Board of Sanitarian Examiners.

There is hereby created a State Board of Sanitarian Examiners to register qualified sanitarians to practice within the State. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

Editor's Note. — Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 4, makes this Article effective October 1, 1982.

Session Laws 1981 (Reg. Sess., 1982), c. 1274, s. 3, contains a severability clause.

§ 90A-51. Definitions.

The words and phrases defined below shall when used in this Article have the following meaning unless the context clearly indicates otherwise:

- (1) "Board" means the Board of Sanitarian Examiners.
- (2) "Certificate of registration" is a document issued as evidence of registration and qualification to practice as a sanitarian or a sanitarian intern under this Article. The certificate shall bear the designation "registered sanitarian" or "sanitarian intern" and show the name of the person, date of issue, serial number, seal, and signatures of the members of the Board.
- (3) "Registered sanitarian" is a sanitarian registered in accordance with the provisions of this Article.
- (4) "Sanitarian" is a public health professional qualified by education in the arts and sciences, specialized training, and acceptable environmental health field experience to effectively plan, organize, manage, execute and evaluate one or more of the many diverse elements comprising the field of environmental health.
- (5) "Sanitarian intern" is a person who possesses the necessary educational qualifications as prescribed in G.S. 90A-53(3), but who has not completed the experience and specialized training requirements in the field of public health sanitation as required for registration. (1959, c. 1271, s. 1; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-52. Practice without certificate unlawful.

(a) In order to safeguard life, health and the environment, it shall be unlawful for any person to practice as a sanitarian in the State of North Carolina or use the title "registered sanitarian" unless such person shall have obtained a certificate of registration from the Board. No person shall offer his services as a registered sanitarian or use, assume or advertise in any way any title or description tending to convey the impression that he is a registered sanitarian unless he is the holder of a current certificate of registration issued by the Board.

(b) Notwithstanding the provisions of subsection (a), a person may practice as a sanitarian intern for a period not to exceed three years provided he has obtained a temporary certificate of registration from the Board. (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-53. Qualifications and examination for registration as a sanitarian.

The Board shall issue certificates to qualified persons as registered sanitarians. A certificate as a registered sanitarian shall be issued to any person upon the Board's determination that such person:

- (1) Has made application to the Board on a form prescribed by the Board;
- (2) Is of good moral character;
- (3) Has received a degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 15 semester hours or its equivalent in the physical and/or biological sciences;
- (4) Has satisfactorily completed a course in specialized instruction and training approved by the Board which course shall be designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by public health sanitation, the elements of good environmental health sanitation, the laws and regulations governing sanitation in environmental health and the protection of the public health;

- (5) Has had at least two years' experience in the field of environmental health sanitation, or at least one year of such experience in the field of environmental health sanitation plus one year of graduate study in the sanitary sciences;
- (6) Has passed an examination administered by the Board designed to test for competence in the subject matters of environmental health sanitation. The examination shall be in a form prescribed by the Board and may be oral, written, or both. The examination for applicants shall be held annually or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. A person shall not be registered if such person fails to meet the minimum grade requirements for examination specified by the Board. Failure to pass an examination shall not prohibit such person from being examined at subsequent times and places as specified by the Board; and
- (7) Has paid a fee set by the Board not to exceed the cost of the examination. (1959, c. 1271, s. 6; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-54. Qualification for registration as a sanitarian intern.

(a) A temporary certificate may be issued under requirements and conditions prescribed by the Board to any person to act or serve as a sanitarian intern without meeting the full requirements of a registered sanitarian for a period not to exceed three years provided such person meets the educational requirements in G.S. 90A-53.

(b) Any person meeting the educational requirements of G.S. 90A-53(3) may make application to the Board on a form prescribed by the Board for temporary registration as a sanitarian intern. The Board shall accept such application when submitted upon the payment of a fee set by the Board not to exceed thirty-five dollars (\$35.00). (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-55. State Board of Sanitarian Examiners; appointment and term of office.

(a) Board Membership. — The Board shall consist of nine members: the Secretary of Human Resources, or his duly authorized representative; one public-spirited citizen, one environmental sanitation educator from an accredited college or university, one local health director, a representative of the Environmental Health Section, North Carolina Division of Health Services; and four practicing sanitarians who qualify by education and experience for registration under this Article, three of whom will represent the Western, Piedmont, and Eastern Regions of the State as described more specifically in the rules and regulations adopted by the Board.

(b) Term of Office. — Each member of the State Board of Sanitarian Examiners shall be appointed by the Governor for a term of four years. Members of the Board serving on October 1, 1982, shall serve until the expiration of the terms for which they were appointed. As the term of each current member expires, the Governor shall appoint a successor in accordance with the provisions of this section. If a vacancy occurs on the Board for any other reason than the expiration of a member's term, the Governor shall appoint a successor for the remainder of the unexpired term. No person shall serve as a member of the Board for more than two consecutive four-year terms.

(c) The Environmental Health Section, North Carolina Public Health Association, Inc., shall submit a recommended list of Board member candidates to the Governor for his consideration in appointments.

(d) The Governor may remove an appointee member for misconduct in office, incompetency, neglect of duty, or other sufficient cause. (1959, c. 1271, s. 2; 1973, c. 476, s. 128; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-56. Compensation of Board members; expenses; employees.

Members of the Board shall receive thirty-five dollars (\$35.00) per day for each day actually spent in the performance of duties required by this Chapter, plus all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a), (1), (2), and (3) for officers and employees of State departments. The Board may employ necessary personnel for the performance of its functions and fix the compensation therefor, within the limits of funds available to the Board. The total expenses of the administration of this Article shall not exceed the total income therefrom and none of the expenses of said Board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-57. Election of officers; meetings; regulations.

(a) The Board shall annually elect a chairman, vice-chairman and a secretary from among its membership. The officers may serve more than one term. The Board shall meet annually in the City of Raleigh, at a time set by the Board, and it may hold additional meetings and conduct business at any place in the State. Five members of the Board shall constitute a quorum to do business. The Board may designate any member to conduct any proceeding, hearing, or investigation necessary to its purpose, but any final action requires a quorum of the Board. The Board is authorized to adopt such rules and regulations as may be necessary for the efficient operation of the Board.

(b) The Board shall have an official seal and each member shall be empowered to administer oaths in taking of testimony upon any matters pertaining to the function of the Board. (1959, c. 1271, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-58. Applicability of Chapter 93B.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes of North Carolina. (1959, c. 1271, s. 5; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-59. Record of proceedings; register of application; register of registered sanitarians and sanitarian interns.

(a) The Board shall keep a record of its proceedings.

(b) The Board shall maintain a register of all applications for registration, which shall show:

- (1) The place of residence, name and age of each applicant;
- (2) The name and address of the employer of each applicant;
- (3) The date of application;
- (4) Complete information of educational and experience qualifications;

- (5) The action taken by the Board;
- (6) The serial number of the certificate of registration issued to the applicant;
- (7) The date on which the Board reviewed and acted upon the application; and
- (8) Such other pertinent information as may be deemed necessary by the Board.

(c) The Board shall maintain a current registry of all sanitarians and sanitarian interns in the State of North Carolina that have been registered in accordance with the provisions of this Article.

(d) These records shall be public records as defined in Chapter 132 of the General Statutes of North Carolina. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-60. Rating of educational institutions.

For the purpose of determining the qualifications of applicants for certification and registration under this Article, the Board may accept the ratings of educational institutions as issued by accrediting bodies acceptable to the Board. (1959, c. 1271, s. 7; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-61. Certification and registration of persons practicing as sanitarians on October 1, 1982; temporary provisions.

(a) Any person who submits to the Board under oath evidence that such person was practicing as a sanitarian (as defined in G.S. 90A-51(4) of this Article) or registered sanitarian (as defined in G.S. 90A-51(3) of this Article) in the State of North Carolina on October 1, 1982, shall be certified as a registered sanitarian.

(b) If any person described under subsection (a) does not make application and pay the appropriate fee to the Board within six months from October 1, 1982, he must then satisfy all the requirements of G.S. 90A-53 in order to obtain a certificate of registration.

(c) Within three years from October 1, 1982, every person specified in subsection (a) who has not satisfied the requirements for a certificate of registration listed in subsection (a) shall thereafter satisfy all the requirements listed in G.S. 90A-53 in order to obtain a certificate of registration. (1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-62. Certification and registration of sanitarians certified in other states.

The Board may, without examination, grant a certificate as a registered sanitarian to any person who at the time of application, is certified as a registered sanitarian by a similar board of another state, district or territory whose standards are acceptable to the Board but not lower than those required by this Article. A fee to be determined by the Board and not to exceed thirty-five dollars (\$35.00) shall be paid by the applicant to the Board for the issuance of a certificate under the provisions of this section. (1959, c. 1271, s. 9; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-63. Renewal of certificates.

(a) A certificate as a registered sanitarian or sanitarian intern issued pursuant to the provisions of this Article will expire on the thirty-first day of December of the current year and must be renewed annually on or before the first day of January. Each application for renewal must be accompanied by a renewal fee to be determined by the Board, but not to exceed thirty-five dollars (\$35.00). The Board is authorized to charge an extra five dollar late renewal fee for renewals made after the first day of January of each year.

(b) Registrations expired for failure to pay renewal fees may be reinstated under the rules and regulations adopted by the Board. (1959, c. 1271, s. 10; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-64. Suspensions and revocations of certificates.

(a) The Board shall have the power to refuse to grant, or may suspend or revoke, any certificate issued under provisions of this Article for any of the causes hereafter enumerated:

- (1) Fraud, deceit, or perjury in obtaining registration under the provisions of this Article;
- (2) Addiction to narcotics;
- (3) Drunkenness on duty;
- (4) Defrauding the public or attempting to do so;
- (5) Failing to renew certificate as required;
- (6) Dishonesty;
- (7) Incompetency;
- (8) Inexcusable neglect of duty;
- (9) Guilty of any unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession.

(b) The procedure to be followed by the Board when refusing to allow an applicant to take an examination, or revoking or suspending a certificate issued under the provisions of this Article, shall be in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina. (1959, c. 1271, s. 11; 1973, c. 1331, s. 3; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-65. Representing oneself as a registered sanitarian.

A holder of a current certificate of registration may append to his name the letters, "R.S." (1959, c. 1271, s. 12; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

§ 90A-66. Violations; penalty; injunction.

Any person violating any of the provisions of this Article or of the rules and regulations adopted by the Board shall be guilty of a misdemeanor and punishable in the discretion of the court. The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1959, c. 1271, s. 13; 1981 (Reg. Sess., 1982), c. 1274, s. 2.)

Chapter 90B.

Social Worker Certification Act.

Sec.

- 90B-1. Short title.
- 90B-2. Purpose.
- 90B-3. Definitions.
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Sec.

- 90B-6.1. Board general provisions.
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- 90B-9. Renewal of certificates.
- 90B-10. Exemption from academic qualifications.
- 90B-11. Disciplinary procedures.
- 90B-12. Violation a misdemeanor.
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§ 90B-1. Short title.

This Chapter shall be known as the "Social Worker Certification Act." (1983, c. 495, s. 1.)

Editor's Note. — Session Laws 1983, c. 495, s. 4, makes this act effective July 1, 1983, for the purposes of the appointment of the initial Board and of administrative preparation for the implementation of this Chapter, and effective Jan. 1, 1984, for all other purposes.

Section 3 of the act provides that nothing contained in the act shall be construed to obligate the General Assembly to make any appropriation to implement the provisions thereof.

§ 90B-2. Purpose.

Since the profession of social work significantly affects the lives of the people of this State, it is the purpose of this Chapter to protect the public by setting standards for qualification, training and experience for those who seek to represent themselves to the public as certified social workers and by promoting high standards of professional performance for those engaged in the practice of social work. (1983, c. 495, s. 1.)

§ 90B-3. Definitions.

- (a) "Board" means the North Carolina Certification Board for Social Work.
- (b) "Social worker" is a person engaging in the public practice of social work who is not a Certified Social Worker, Certified Master Social Worker, Certified Clinical Social Worker or Certified Social Work Manager, as defined in this Chapter.
- (c) A person is engaged in the "public practice of social work" who holds himself or herself out to the public as a social worker and who offers to perform or does perform for other persons, services which involve the application of social work values, principles and techniques in areas such as social work services, consultation and administration, and social work planning and research.
- (d) "Certified Social Worker," "Certified Master Social Worker," "Certified Clinical Social Worker," "Certified Social Work Manager" means a person who is engaged in the practice of social work and who is certified under subparagraphs (b), (c), (d) and (e), respectively, of G.S. 90B-7. (1983, c. 495, s. 1.)

§ 90B-4. Prohibitions.

(a) After January 1, 1984, except as otherwise provided in this Chapter, it is unlawful for any person who is not certified under this Chapter, to represent himself or herself to be certified under this Chapter or hold himself or herself out to the public by any title or description denoting that he or she is certified under this Chapter. Nothing herein shall prohibit school social workers who are certified by the State Board of Education from practicing school social work under the title "Certified School Social Worker." Nothing herein shall be construed as prohibiting social workers who are not certified by the North Carolina Certification Board for Social Work from practicing social work. Notwithstanding any other provision of law, no agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government or counties, cities, towns, villages, other municipal corporations, political subdivisions of the State, public authorities, private corporations created by act of the General Assembly or any firm or corporation receiving State funds shall require the obtaining or holding of any certificate issued under this Chapter or the taking of an examination held pursuant to this Chapter as a requirement for obtaining or continuing in employment. (1983, c. 495, s. 1.)

§ 90B-5. North Carolina Certification Board for Social Work; appointments; terms; composition.

For the purpose of carrying out the provisions of this Chapter, there is hereby created the North Carolina Certification Board for Social Work which shall consist of seven members appointed by the Governor in the manner hereinafter prescribed. The Governor may remove any member of the Board for neglect of duty or malfeasance or conviction of a felony or other crime of moral turpitude, but for no other reason.

- (1) At least two members of the Board shall be Certified Social Workers except that initial appointees shall be persons who meet the educational and experience requirements for certification as Certified Social Workers under the provisions of this Chapter; two members shall be Certified Clinical Social Workers except that initial appointees shall be persons who meet the educational and experience requirements for certification as Certified Clinical Social Workers under the provisions of this Chapter; and three members shall be appointed from the public at large. Composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State of North Carolina.
- (2) At all times the Board shall include at least one member primarily engaged in Social work education, at least one member primarily engaged in social work in the public sector, and at least one member primarily engaged in social work in the private sector.
- (3) All members of the Board shall be residents of the State of North Carolina, and after the establishment of the initial Board, all members, with the exception of the public members, shall be certified by the Board under the provisions of this Chapter. Professional members of the Board must be actively engaged in the practice of social work or in the education and training of students in social work, and have been for at least three years prior to their appointment to the Board. Such activity during the two years preceding the appointment shall have occurred primarily in this State.
- (4) The term of office of each member of the Board shall be three years; provided, however, that of the members first appointed, three shall be appointed for terms of one year, two for terms of two years, and two

for terms of three years. No member shall serve more than two consecutive three-year terms.

- (5) Each term of service on the Board shall expire on the 30th day of June of the year in which the term expires. As the term of a member expires, the Governor shall make the appointment for a full term, or, if a vacancy occurs for any other reason, for the remainder of the unexpired term.
- (6) Members of the Board shall receive compensation for their services and reimbursement for expenses incurred in the performance of duties required by this Chapter, at the rates prescribed in G.S. 93B-5.
- (7) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, the necessary personnel for the performance of its functions, and fix their compensation within the limits of funds available to the Board. (1983, c. 495, s. 1.)

§ 90B-6. Functions and duties of the Certification Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates under this Chapter, and shall issue a certificate to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) The Board shall establish and receive fees not to exceed fifty dollars (\$50.00) for initial or renewal application, not to exceed one hundred dollars (\$100.00) for examination, and not to exceed fifteen dollars (\$15.00) for late renewal, maintain Board accounts of all receipts, and make expenditures from Board receipts for any purpose which is reasonable and necessary for the proper performance of its duties under this Chapter.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for certification and certificate renewal, including but not limited to the power to adopt or use examination materials and accreditation standards of the Council on Social Work Education or other recognized accrediting agency and the power to establish reasonable standards for continuing social work education; provided that for certificate renewal no examination shall be required; provided further, that the Board shall not have the power to withhold approval of study or training courses offered by a college or university having a social work program approved by the Council on Social Work Education.

(h) Subject to the provisions of Chapter 150A of the General Statutes, the Board shall have the power to adopt, amend, or rescind rules and regulations to carry out the purposes of this Chapter, including but not limited to the power to adopt ethical and disciplinary standards. (1983, c. 495, s. 1.)

§ 90B-6.1. Board general provisions.

The Board shall be subject to the administrative provisions of Chapter 93B of the General Statutes. (1983, c. 495, s. 1.)

§ 90B-7. Titles and qualifications for certificates.

(a) Each person desiring to obtain a certificate from the Board shall make application to the Board upon such forms and in such manner as the Board shall prescribe, together with the required application fee established by the Board.

(b) The Board shall issue a certificate as "Certified Social Worker" to an applicant who:

- (1) Has a bachelor's degree in a social work program from a college or university having a social work program accredited or admitted to candidacy for accreditation by the Council on Social Work Education for undergraduate curricula or has a bachelor's degree in a subject area related to human services and has completed a minimum of 18 semester hours of social work training in a social work program accredited or admitted to candidacy for accreditation by the Council on Social Work Education; and
- (2) Has passed the Board examination for the certification of persons in this classification.

(c) The Board shall issue a certificate as "Certified Master Social Worker" to an applicant who:

- (1) Has a master's or doctor's degree in a social work program from a college or university having a social work program approved by the Council on Social Work Education; and
- (2) Has passed the Board examination for the certification of persons in this classification.

(d) The Board shall issue a certificate as a "Certified Clinical Social Worker" to an applicant who:

- (1) Holds or qualifies for a current certificate as a Certified Master Social Worker; and
- (2) Shows to the satisfaction of the Board that he or she has had two years of experience in a clinical setting with appropriate supervision in the field of specialization in which the applicant will practice; and
- (3) Has passed the Board examination for the certification of persons in this classification.

(e) The Board shall issue a certificate as a "Certified Social Work Manager" to an applicant who:

- (1) Holds or qualifies for a current certificate as a Certified Social Worker; and
- (2) Shows to the satisfaction of the Board that he or she has had two years of experience in an administrative setting with appropriate supervision and training; and
- (3) Has passed the Board examination for the certification of persons in this classification. (1983, c. 495, s. 1.)

§ 90B-8. Persons from other jurisdictions.

The Board may grant a certificate without examination or by special examination to any person who, at the time of application, is certified, registered or licensed as a social worker by a similar board of another country, state, or territory whose certification, registration or licensing standards are substantially equivalent to those required by this Chapter. (1983, c. 495, s.)

§ 90B-9. Renewal of certificates.

(a) All certificates shall be effective upon date of issuance by the Board, and shall expire on the second June 30 thereafter.

(b) All certificates issued hereunder shall be renewed at the times and in the manner provided by this section. At least 45 days prior to expiration of each certificate, the Board shall mail a notice for certificate renewal to the person certified for the current certification period. Prior to the expiration date, the applicant must return the notice properly completed, together with a renewal fee established by the Board and evidence of completion of the continuing education requirements established by the Board under G.S. 90B-6(g), upon receipt of which the Board shall issue to the person to be certified the renewed certificate for the period stated on the certificate.

(c) Any person certified who allows his certificate to lapse for failure to apply for renewal within 45 days after notice shall have his or her certificate automatically suspended, and be subject to a late renewal fee as established pursuant to G.S. 90B-6(f), and if he or she fails to apply for renewal of a certificate within one year after date of such suspension, the certificate shall lapse and may be reissued only upon application as for an original certificate.

(d) Any person certified and desiring to retire temporarily from the practice of social work shall send written notice thereof to the Board. Upon receipt of such notice, his or her name shall be placed upon the nonpracticing list and he or she shall not be subject to payment or renewal fees. In order to renew certification, application for renewal shall be made in ordinary course with a renewal fee for the current period. (1983, c. 495, s. 1.)

§ 90B-10. Exemption from academic qualifications.

Applicants who were engaged in the practice of social work before January 1, 1984, shall be exempt from the academic qualifications required by this act for Certified Social Workers and Certified Social Work Managers and shall be certified upon passing the Board examination and meeting the experience requirements, if any, for certification of persons in that classification. (1983, c. 495, s. 1.)

§ 90B-11. Disciplinary procedures.

The Board may, in accordance with the provisions of Chapter 150A of the General Statutes, refuse to grant or to renew, may suspend, or may revoke the certificate of any person certified under this Chapter on the following grounds:

- (1) Conviction of misdemeanor under this Chapter; or
- (2) Conviction of a felony under the laws of the United States or of any state of the United States; or
- (3) Gross unprofessional conduct, dishonest practice or incompetence in the practice of social work; or
- (4) Procuring or attempting to procure a certificate by fraud, deceit, or misrepresentation; or
- (5) Any fraudulent or dishonest conduct in social work; or
- (6) Inability of the person to perform the functions for which he or she is certified, or substantial impairment of abilities by reason of physical or mental disability; or
- (7) Violations of any of the provisions of this Chapter or of rules of the Board. (1983, c. 495, s. 1.)

§ 90B-12. Violation of a misdemeanor.

Any person violating any provision of this Chapter is guilty of a misdemeanor and, upon conviction thereof, may be punishable by fine not exceeding two hundred dollars (\$200.00) for the first offense and five hundred dollars (\$500.00) for each subsequent offense, by imprisonment of not more than six months, or by both such fine and imprisonment. (1983, c. 495, s. 1.)

§ 90B-13. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person from violating the prohibitions of this Chapter. The Board shall not be required to post bond in connection with such proceeding. (1983, c. 495, s. 1.)

Chapter 91.

Pawnbrokers.

§ 91-2. License; business confined to municipalities.

Local Modification. — Alleghany: 1983, c. 382; Jackson: 1983, c. 169; Lenoir: 1983, c. 169; Pitt: 1983, c. 382.

§ 91-3. Municipal authorities to grant and control license; bond.

Local Modification. — Alleghany: 1983, c. 382; Jackson: 1983, c. 169; Lenoir: 1983, c. 169; Pitt: 1983, c. 382.

§ 91-4. Records to be kept.

Local Modification. — Alleghany: 1983, c. 382; Jackson: 1983, c. 169; Lenoir: 1983, c. 169; Pitt: 1983, c. 382.

Chapter 93.

Public Accountants.

Sec.

93-1. Definitions; practice of law.

93-8. Public practice of accounting by corporations prohibited.

Sec.

93-12. Board of Certified Public Accountant Examiners.

93-13. Violation of Chapter; penalty.

§ 93-1. Definitions; practice of law.

(a) Definitions. — As used in this Chapter certain terms are defined as follows:

- (1) An "accountant" is a person engaged in the public practice of accountancy who is neither a certified public accountant nor a public accountant as defined in this Chapter.
 - (2) "Board" means the Board of Certified Public Accountant Examiners as provided in this Chapter.
 - (3) A "certified public accountant" is a person who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter.
 - (4) A "public accountant" is a person engaged in the public practice of accountancy who is registered as a public accountant under the provisions of this Chapter.
 - (5) A person is engaged in the "public practice of accountancy" who holds himself out to the public as a certified public accountant or an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports.
- (1925, c. 261, s. 1; 1929, c. 219, s. 1; 1951, c. 844, s. 1; 1979, c. 750, s. 3; 1983, c. 185, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1983 amendment, effective April 18,

1983, deleted "engaged in the practice of accountancy" following "is a person" in subdivision (a)(3) and inserted "a certified public accountant or" near the beginning of subdivision (a)(5).

§ 93-8. Public practice of accounting by corporations prohibited.

It shall be unlawful for any certified public accountant to engage in the public practice of accountancy in this State through any corporate form, except as provided in General Statutes Chapter 55B. (1925, c. 261, s. 6; 1951, c. 844, s. 3; 1969, c. 718, s. 17; 1983, c. 185, s. 3.)

Effect of Amendments. — The 1983 amendment, effective April 18, 1983, rewrote this section, which formerly read "Except as provided for in Chapter 55B of the General Statutes of

North Carolina, it shall be unlawful for any corporation to engage in the public practice of accountancy in this State."

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

- (5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed an examination to the satisfaction of the Board, in "accounting theory," "accounting practice," "auditing," "business law," and other related subjects.

From and after July 1, 1961, any person shall be eligible to take the examination given by the Board, or to receive a certificate of qualification to practice as a certified public accountant, who is a citizen of the United States or has declared his intention of becoming a citizen or is a resident alien, and has been domiciled in or resided for at least four months within the State of North Carolina immediately prior to the filing of an application to take the examination or to receive a certificate of qualification, is 18 years of age or over, and is of good moral character, and submits evidence satisfactory to the Board that:

- a. He holds a bachelor's degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, and
- b. His degree studies included a concentration in accounting as defined by the Board or that he supplemented his degree studies with courses that the Board determines to be substantially equivalent to a concentration in accounting, and
- c. Satisfactory evidence of the completion of two years in an accredited college or university or its equivalent with a concentration in accounting as defined by the Board and two years experience in the practice of public accountancy under the direct supervision of a certified public accountant, in addition to other experience requirements in this section, may be substituted for a bachelor's degree.

Provided, however, the Board may, in its discretion, waive the education requirement of any candidate if the Board is satisfied from the result of a special written examination given the candidate by the Board to test his educational qualifications that he is as well equipped, educationally, as if he met the education requirements specified above. The Board may provide by regulation for the general scope of

such examinations and may obtain such advice and assistance as it deems appropriate to assist it in preparing, administering and grading such special examinations.

Such applicant, in addition to passing the examination given by the Board, shall have the endorsement as to his eligibility of three certified public accountants who currently hold licenses in any state or territory of the United States or the District of Columbia and shall have had either:

- a. Two years experience in the field of accounting under the direct supervision of a certified public accountant who currently holds a valid license in any state or territory of the United States or the District of Columbia, or
- b. Five years experience teaching accounting in a four-year college or university accredited by one of the regional accrediting associations or in a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution; or
- c. Five years experience in the field of accounting; or five years experience teaching college transfer accounting courses at a community college or technical institute accredited by one of the regional accrediting associations; or
- d. Any combination of such experience determined by the Board to be substantially equivalent to the foregoing.

A Master's or more advanced degree in accounting, tax law, economics or business administration from an accredited college or university may be substituted for one year of experience. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such person shall have had the required experience.

- (6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia, when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this Chapter: Provided, however, that such applicant has been a bona fide resident of this State for not less than four months or, if a nonresident, he has maintained or has been a member of a firm that has maintained for not less than four months a bona fide office within this State for the public practice of accounting and, provided further, that the state or political subdivision of the United States upon whose certificate the reciprocal action is based grants the same privileges to holders of certificates as certified public accountants issued pursuant to the provisions of this Chapter. The Board, by general rule, may grant temporary permits to applicants under this subsection pending their qualification for reciprocal certificates.
- (7) To charge for each examination provided for in this Chapter a fee not exceeding one hundred twenty-five dollars (\$125.00). This fee shall be payable to the secretary-treasurer of the Board by the applicant at the time of filing application. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination.
- (7a) To charge for each initial certificate of qualification provided for in this Chapter a fee not exceeding seventy-five dollars (\$75.00).

- (8) To require the renewal of all certificates of qualification annually on the first day of July, and to charge an annual renewal fee not to exceed fifty dollars (\$50.00).
- (9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants in this State. The rules so adopted shall be publicized and filed in the office of the Attorney General as provided by Chapter 150A. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or public accountant or to censure the holder of any such certificate or to assess a civil penalty not to exceed one thousand dollars (\$1,000) for any one or combination of the following causes:
- Conviction of a felony under the laws of the United States or of any state of the United States.
 - Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.
 - Fraud or deceit in obtaining a certificate as a certified public accountant.
 - Dishonesty, fraud or gross negligence in the public practice of accountancy.
 - Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of Chapter 150A of the General Statutes. Any civil penalty assessed under this section shall be collected by the Board and transferred to the State Treasurer for use in the General Fund.

(1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20; 1959, c. 1188; 1961, c. 1010; 1971, c. 738, ss. 1-3; 1973, c. 476, s. 193; c. 1331, s. 3; 1975, c. 107; 1975, 2nd Sess., c. 983, s. 69; 1977, c. 804, ss. 1, 2; 1979, c. 750, ss. 6-10; 1979, 2nd Sess., c. 1087, ss. 1, 2; 1981, c. 10; 1983, c. 185, ss. 4-11.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subdivision (8) of this section, set out above, was inadvertently omitted from the section in the 1981 replacement volume and the 1979 and 1981 supplements.

Effect of Amendments. — The 1981 amendment, in the first sentence of subdivision (6), deleted a clause providing that certificates of qualification could be granted to those holding valid certificates as certified public accountants issued by a foreign nation.

The 1983 amendment, effective April 18, 1983, in subdivision (5), rewrote the second paragraph and the fourth undesignated paragraph and paragraph a. thereunder, in the first

sentence of subdivision (7) deleted "and certificate" following "each examination" and raised the fee from \$75.00 to \$125.00, added subdivision (7a), in subdivision (8) substituted "to charge an annual renewal fee not to exceed fifty dollars (\$50.00)" for "charge and collect a fee not to exceed twenty-five dollars (\$25.00) for such renewal," and in subdivision (9) deleted "engaged in the public practice of accountancy" preceding "in this State" in the first sentence of the introductory paragraph, inserted "or to assess a civil penalty not to exceed one thousand dollars (\$1,000)" in the last sentence of the introductory paragraph, and added the last sentence of subdivision (9).

§ 93-13. Violation of Chapter; penalty.

Any violation of the provisions of this Chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than one hundred dollars (\$100.00) and not exceeding one thousand dollars (\$1,000) for each offense. (1925, c. 261, s. 11; 1983, c. 185, s. 12.)

Effect of Amendments. — The 1983 amendment, effective April 18, 1983, substituted "one hundred dollars (\$100.00)" for "fifty dollars

(\$50.00)" and "one thousand dollars (\$1,000)" for "two hundred dollars (\$200.00)."

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

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- 93A-4. (Effective September 1, 1984) Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.
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- 93A-34. License required; application for license; fees; requirements for issuance of license.
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- 93A-39. (Effective July 1, 1984) Title.
- 93A-40. (Effective July 1, 1984) Registration required of time share projects; real estate salesmen license required.
- 93A-41. (Effective July 1, 1984) Definitions.
- 93A-42. (Effective July 1, 1984) Time shares deemed real estate.
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- 93A-44. (Effective July 1, 1984) Public offering statement.
- 93A-45. (Effective July 1, 1984) Purchaser's right to cancel; escrow; violation.
- 93A-46. (Effective July 1, 1984) Prizes.
- 93A-47. (Effective July 1, 1984) Time shares proxies.
- 93A-48. (Effective July 1, 1984) Exchange programs.
- 93A-49. (Effective July 1, 1984) Service of process on exchange company.
- 93A-50. (Effective July 1, 1984) Securities laws apply.
- 93A-51. Rule-making authority.
- 93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.
- 93A-53. Register of applicants; roster of registrants; registered projects; financial report to Secretary of State.
- 93A-54. (Effective July 1, 1984) Disciplinary action by Commission.
- 93A-55. (Effective July 1, 1984) Private enforcement.
- 93A-56. (Effective July 1, 1984) Penalty for violation of Article.
- 93A-57. (Effective July 1, 1984) Release of liens.

ARTICLE 1.

*Real Estate Brokers and Salesmen.***§ 93A-1. License required of real estate brokers and real estate salesmen.**

From and after July 1, 1957, it shall be unlawful for any person, partnership, association or corporation in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission (hereinafter referred to as the Commission), under the provisions of this Chapter. (1957, c. 744, s. 1; 1969, c. 191, s. 1; 1983, c. 81, ss. 1, 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Real Estate Commission" for "Real Estate

Licensing Board" and "Commission" for "Board."

CASE NOTES

Cited in *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982).

§ 93A-2. Definitions and exceptions.

(a) A real estate broker within the meaning of this Chapter is any person, partnership, association, or corporation who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.

(b) The term real estate salesman within the meaning of this Chapter shall mean and include any person who under the supervision of a real estate broker, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker.

(c) The provisions of this Chapter shall not apply to and shall not include:

- (1) Any person, partnership, association or corporation who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where the acts are performed in the regular course of or as incident to the management of that property and the investment therein;
- (2) Any person acting as an attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate;
- (3) The acts or services of an attorney-at-law;
- (4) Any person, while acting as a receiver, trustee in bankruptcy, guardian, administrator or executor or any person acting under order of any court;

- (5) Any person, while acting as a trustee under a trust agreement, deed of trust or will, or his regular salaried employees;
- (6) Any salaried person employed by a licensed real estate broker, for and on behalf of the owner of any real estate or the improvements thereon, which the licensed broker has contracted to manage for the owner, if the salaried employee is limited in his employment to: exhibiting residential units on the real estate to prospective tenants; providing the prospective tenants with information about the lease of the residential units; accepting applications for lease of the residential units; completing and executing preprinted form leases; and accepting security deposits and rental payments for the residential units only when the deposits and rental payments are made payable to the owner or the broker employed by the owner. The salaried employee shall not negotiate the amount of security deposits or rental payments and shall not negotiate leases or any rental agreements on behalf of the owner or broker; or
- (7) Any owner who personally leases or sells his own property. (1957, c. 744, s. 2; 1967, c. 281, s. 1; 1969, c. 191, s. 2; 1975, c. 108; 1983, c. 81, ss. 4, 5.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, deleted the former last sentence of subsection (a), which provided that a broker shall be deemed to include a person, partnership, association, or

corporation who for a fee sells or offers to sell the names of persons, etc., who have real estate for rental, lease, or sale, and rewrote subsection (c).

CASE NOTES

Owner exemption clauses of Chapter 93A have been effectively eliminated from this section insofar as licensed real estate brokers and salesmen are concerned. Section 6 of Chapter 616 of the 1979 Session Laws, effective May 21, 1979 and compiled in § 93A-6, has expressly provided that, notwithstanding anything to the contrary in Chapter 93A, the board shall have the power to suspend or revoke the license of a real estate broker or real estate salesman who violates any of the provisions of Chapter 93A when selling or leasing his own property. *Cox v. North Carolina Real Estate Licensing Bd.*, 47 N.C. App. 135, 266 S.E.2d 851, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Shareholder is not an owner of realty of the corporation in which the shares are held so as to bring the shareholder within the

"owner" exemption provisions of this section. *Cox v. North Carolina Real Estate Licensing Bd.*, 47 N.C. App. 135, 266 S.E.2d 851, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Person Who Purchases or Leases Land for His Own Account. —

Where plaintiffs allege a contract to buy real estate on their own account under the terms of the listing agreement made by owner with defendant-broker and to share in the sales commission with defendant, and plaintiffs were not engaging in brokerage activities "for others" but were acting for themselves in buying the land and in reducing the purchase price through the commission sharing agreement with defendant, plaintiff's agreement does not violate the licensing statute and it is enforceable. *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982).

§ 93A-3. Commission created; compensation; organization.

(a) There is hereby created the North Carolina Real Estate Commission for issuing licenses to real estate brokers and real estate salesmen, hereinafter called the Commission. The Commission shall consist of seven members to be appointed by the Governor; provided, that at least two members of the Commission shall be licensed real estate brokers, real estate salesmen, or otherwise directly engaged in the real estate business; and at least two members of the Commission must be persons who are not involved directly or indirectly in the

real estate business. Members of the Commission shall serve three-year terms, so staggered that the terms of two members expire in one year, the terms of two members expire in the next year, and the terms of three members expire in the third year of each three-year period. The members of the Commission shall elect one of their members to serve as chairman of the Commission for a term of one year. The Governor may remove any member of the Commission for misconduct, incompetency, or willful neglect of duty. The Governor shall have the power to fill all vacancies occurring on the Commission.

(b) Members of the Commission shall receive as compensation for each day spent on work for the Commission the per diem, subsistence and travel allowances as provided in G.S. 93B-5. The total expense of the administration of this Chapter shall not exceed the total income therefrom; and none of the expenses of said Commission or the compensation or expenses of any office thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Commission nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. After all expenses of operation, the Commission may set aside an expense reserve each year not to exceed ten percent (10%) of the previous year's gross income; then any surplus shall go to the general fund of the State of North Carolina.

(c) The Commission shall have power to make reasonable bylaws, rules and regulations that are not inconsistent with the provisions of this Chapter and the General Statutes; provided, however, the Commission shall not make rules or regulations regulating commissions, salaries, or fees to be charged by licensees under this Chapter. The Commission shall adopt a seal for its use, which shall bear thereon the words "North Carolina Real Estate Commission." Copies of all records and papers in the office of the Commission duly certified and authenticated by the seal of the Commission shall be received in evidence in all courts and with like effect as the originals.

(d) The Commission may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules and regulations that the Commission may promulgate. The Commission shall fix salaries and shall require employees to make good and sufficient surety bond for the faithful performance of their duties.

(e) The Commission shall be entitled to the services of the Attorney General of North Carolina, in connection with the affairs of the Commission or may on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, as to specific matters, but the fee paid for such service shall be approved by the Attorney General. The Commission may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter and collect the penalties provided therein.

(f) The Commission is authorized to expend expense reserve funds as defined in G.S. 93A-3(b) for the purpose of conducting education and information programs relating to the real estate brokerage business for the information, education, guidance and protection of the general public, licensees, and applicants for license. The education and information programs may include preparation, printing and distribution of publications and articles and the conduct of conferences, seminars, and lectures. (1957, c. 744, s. 3; 1967, c. 281, s. 2; c. 853, s. 1; 1971, c. 86, s. 1; 1979, c. 616, ss. 1, 2; 1983, c. 81, ss. 1, 2, 6-8.)

Effect of Amendments. —

The 1983 amendment, effective September 1, 1983, rewrote the first sentences of subsections

(b), (c), and (d). The amendment also substituted "Real Estate Commission" for "Real Estate Licensing Board" in the first sentence of

subsection (a) and "Commission" for "Board" throughout the section.

§ 93A-4. (Effective until September 1, 1984) Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Commission on such forms as are prescribed by the Commission. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate broker shall have been actively engaged as a licensed real estate salesman in this State for at least 24 months on a full-time basis prior to making application for a license as a real estate broker, or shall furnish evidence satisfactory to the Commission of experience in real estate transactions which the Commission shall find equivalent to such 24 months' experience as a licensed real estate salesman, or shall furnish evidence satisfactory to the Commission of completion of at least 90 hours of classroom instruction which shall include the study of: real estate broker responsibilities, mortgages, easements, leases, liens, taxation, zoning, real property insurance, real estate appraising, agency contracts, land contracts, government regulation of land transfers and such other topics as the Commission determines, at a school approved by the Commission. Each applicant for a license as a real estate salesman shall furnish evidence satisfactory to the Commission of completion of 30 classroom hours of such courses of education in real estate subjects at a school approved by the Commission as the Commission shall by regulation prescribe or shall furnish evidence satisfactory to the Commission of experience in real estate transactions which the Commission shall find equivalent to such real estate education. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars (\$30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Commission but not to exceed twenty dollars (\$20.00).

(b) Any person who files such application to the Commission in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

The Commission may make such investigation as it deems necessary into the ethical background of the applicant. If the results of the examination and investigation shall be satisfactory to the Commission, then the Commission shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law. Anyone failing to pass an examination may be reexamined without payment of additional fee, under such rules as the Commission may adopt in such cases.

Provided, however, that any person who, at the time of the passage or at the effective date of this Chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a sworn application with the Commission setting forth his qualifications, including a statement that such applicant has not within five years preceding the

filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Commission under the provisions of this Chapter on proper application therefor and payment of a fee of ten dollars (\$10.00).

(c) All licenses granted and issued by the Commission under the provisions of this Chapter shall expire on the thirtieth day of June following issuance thereof, and shall become invalid after such date unless reinstated. Renewal of such license may be effected at any time during the month of June preceding the date of expiration of such license upon proper application to the Commission accompanied by the payment of a renewal fee fixed by the Commission but not to exceed fifteen dollars (\$15.00) to the Executive Director of the Commission, provided, the Commission may by regulation require the renewal of such licenses for periods not exceeding three years upon payment of a renewal fee fixed by the Commission but not to exceed fifteen dollars (\$15.00) for each 12-month period; provided further, that in the event of the licensee's death, removal to another state or upon voluntary surrender of the renewed license the Commission shall, upon written application by the licensee or his estate, (administrator, executor, or personal representative) refund the amount of the renewal fee prepaid for the unexpired license year or years other than the current year and the renewal receipt or pocket card shall contain notice of this refund provision. All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars (\$5.00) in addition to the required renewal fee. In the event a licensee fails to obtain a reinstatement of such license within 12 months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of one dollar (\$1.00) by the licensee.

(d) The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt rules and regulations necessary for the approval of real estate schools and such rules and regulations may, in accordance with G.S. 93A-4(a), prescribe specific requirements pertaining to the teaching of mechanics and law governing real estate transactions at such schools.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11.)

Section Set Out Twice. — The section above is effective until Sept. 1, 1984. For this section as amended effective Sept. 1, 1984, see the following section, also numbered 93A-4.

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, deleted "and

shall state the name and address of the real estate broker with whom the applicant is to be associated" at the end of the last sentence of subsection (a). The amendment also substituted "Commission" for "Board" throughout the section.

CASE NOTES

Quoted in North Carolina Real Estate Licensing Bd. v. Gallman, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

§ 93A-4. (Effective September 1, 1984) Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Commission on such forms as are prescribed by the Commission. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate salesman shall, within five years preceding the date application is made, have satisfactorily completed, at a school approved by the Commission, a real estate fundamentals course consisting of at least 30 hours of classroom instruction in subjects determined by the Commission, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the course. Each applicant for a license as a real estate broker shall, within five years preceding the date the application is made, either have been actively engaged on a full-time basis as a licensed real estate salesman for at least two years, or have satisfactorily completed, at a school approved by the Commission, advanced courses in Real Estate Law, Real Estate Finance, and Real Estate Brokerage Operations, each consisting of at least 30 hours of classroom instruction, these courses to be in addition to those required for a real estate salesman license, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the above requirements. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars (\$30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Commission but not to exceed twenty dollars (\$20.00) and shall state the name and address of the real estate broker with whom the applicant is to be associated.

(b) Any person who files such application to the Commission in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

The Commission may make such investigation as it deems necessary into the ethical background of the applicant. If the results of the examination and investigation shall be satisfactory to the Commission, then the Commission shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law. Anyone failing to pass an examination may be reexamined without payment of additional fee, under such rules as the Commission may adopt in such cases.

Provided, however, that any person who, at the time of the passage or at the effective date of this Chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a

sworn application with the Commission setting forth his qualifications, including a statement that such applicant has not within five years preceding the filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Commission under the provisions of this Chapter on proper application therefor and payment of a fee of ten dollars (\$10.00).

(c) All licenses granted and issued by the Commission under the provisions of this Chapter shall expire on the thirtieth day of June following issuance thereof, and shall become invalid after such date unless reinstated. Renewal of such license may be effected at any time during the month of June preceding the date of expiration of such license upon proper application to the Commission accompanied by the payment of a renewal fee fixed by the Commission but not to exceed fifteen dollars (\$15.00) to the Executive Director of the Commission, provided, the Commission may by regulation require the renewal of such licenses for periods not exceeding three years upon payment of a renewal fee fixed by the Commission but not to exceed fifteen dollars (\$15.00) for each 12-month period; provided further, that in the event of the licensee's death, removal to another state or upon voluntary surrender of the renewed license the Commission shall, upon written application by the licensee or his estate, (administrator, executor, or personal representative) refund the amount of the renewal fee prepaid for the unexpired license year or years other than the current year and the renewal receipt or pocket card shall contain notice of this refund provision. All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars (\$5.00) in addition to the required renewal fee. In the event a licensee fails to obtain a reinstatement of such license within 12 months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of one dollar (\$1.00) by the licensee.

(d) The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt rules and regulations necessary for the approval of real estate schools and such rules and regulations may, in accordance with G.S. 93A-4(a), prescribe specific requirements pertaining to the teaching of mechanics and law governing real estate transactions at such schools.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11; c. 384.)

Section Set Out Twice. — The section above is effective Sept. 1, 1984. For this section as in effect until Sept. 1, 1984, see the preceding section, also numbered 93A-4.

Effect of Amendments. — The first 1983 amendment, effective September 1, 1983, deleted "and shall state the name and address of the real estate broker with whom the appli-

cant is to be associated" at the end of the last sentence of subsection (a). The amendment also substituted "Commission" for "Board" throughout the section.

The second 1983 amendment, effective Sept. 1, 1984, rewrote the third and fourth sentences of subsection (a).

§ 93A-5. Register of applicants; roster of brokers and salesmen; financial report to Secretary of State.

(a) The Executive Director of the Commission shall keep a register of all applicants for license, showing for each the date of application, name, place of residence, and whether the license was granted or refused. Said register shall be prima facie evidence of all matters recorded therein.

(b) The Executive Director of the Commission shall also keep a current roster showing the names and places of business of all licensed real estate brokers and real estate salesmen, which roster shall be kept on file in the office of the Commission and be open to public inspection.

(c) On or before the first day of September of each year, the Commission shall file with the Secretary of State a copy of the roster of real estate brokers and real estate salesmen holding certificates of license, and at the same time shall also file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Commission for the preceding fiscal year ending June 30 attested by the affidavit of the Executive Director of the Commission. (1957, c. 744, s. 5; 1969, c. 191, s. 4; 1983, c. 81, ss. 2, 9, 12.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, deleted "place of business" following "date of application, name," in the first sentence of subsection

(a). The amendment also substituted "Commission" for "Board" and "Executive Director" for "secretary-treasurer" throughout the section.

§ 93A-6. Disciplinary action by Commission.

(a) The Commission shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any person or entity licensed under this Chapter, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a licensee has violated any of the provisions of this Chapter, the Commission may hold a hearing on the allegations of misconduct.

All such hearings shall be conducted in accordance with the provisions of Chapter 150A of the General Statutes. The Commission shall have power to suspend or revoke at any time a license issued under the provisions of this Chapter, or to reprimand or censure any licensee, if, following a hearing, the Commission adjudges the licensee to be guilty of:

- (1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact;
- (2) Making any false promises of a character likely to influence, persuade, or induce;
- (3) Pursuing a course of misrepresentation or making of false promises through agents, salesmen, advertising or otherwise;
- (4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts;
- (5) Accepting a commission or valuable consideration as a real estate salesman for the performance of any of the acts specified in this Chapter, from any person except the licensed broker by whom he is employed;
- (6) Representing or attempting to represent a real estate broker other than the broker by whom he is engaged or associated, without the express knowledge and consent of the broker with whom he is associated;
- (7) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others;

- (8) Being unworthy or incompetent to act as a real estate broker or salesman in a manner as to endanger the interest of the public;
- (9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter;
- (10) Any other conduct which constitutes improper, fraudulent or dishonest dealing;
- (11) Performing or undertaking to perform any legal service, as set forth in G.S. 84-2.1, or any other acts not specifically set forth in that section;
- (12) Commingling the money or other property of his principals with his own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received by him as a real estate broker acting in that capacity, or an escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, these accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest bearing account and also provide for the disbursement of the interest accrued;
- (13) Failing to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller;
- (14) Failing as a broker, at the time the transaction is consummated, to deliver to the seller in every real estate transaction, a complete detailed closing statement showing all of the receipts and disbursements handled by him for the seller or failing to deliver to the buyer a complete statement showing all money received in the transaction from the buyer and how and for what it was disbursed; or
- (15) Violating any rule or regulation promulgated by the Commission.

The Executive Director shall transmit a certified copy of all final orders of the Commission suspending or revoking licenses issued under this Chapter to the clerk of superior court of the county in which the licensee maintains his principal place of business. The clerk shall enter these orders upon the judgment docket of the county.

(b) Following a hearing, the Commission shall also have power to suspend or revoke any license issued under the provisions of this Chapter or to reprimand or censure any licensee when:

- (1) The licensee has obtained a license by false or fraudulent representation;
- (2) The licensee has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of the criminal offenses of: embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud, or any other offense involving moral turpitude which would reasonably affect the licensee's performance in the real estate business;
- (3) The licensee has violated any of the provisions of G.S. 93A-6(a) when selling, leasing, or buying his own property; or
- (4) The broker's unlicensed employee, who is exempt from the provisions of this Chapter under G.S. 93A-2(c)(6), has committed, in the regular course of business, any act which, if committed by the broker, would constitute a violation of G.S. 93A-6(a) for which the broker could be disciplined.

(c) The Commission may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or rules promulgated by the Commission. The superior court shall have the power to grant these injunctions even if criminal prosecution has been or may be instituted as a result of the violations, or whether the person is a licensee of the Commission.

(d) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by his principals or held in escrow or in trust for his principals. The Commission may inspect these records periodically, without prior notice and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a licensee. (1957, c. 744 s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7; 1981, c. 682, s. 15; 1983, c. 81, s. 13.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, substituted "of" for "or" preceding "an offense involving moral turpitude" near the middle of

subdivision (2) of subsection (a1), and added subsection (d).

The 1983 amendment, effective September 1, 1983, rewrote this section.

CASE NOTES

Dishonesty of Licensee as Owner. — The licensing act should not be interpreted to require a licensee to be honest as a broker or salesman while allowing him to be dishonest as an owner. *North Carolina Real Estate Licensing Bd. v. Gallman*, 52 N.C. App. 118, 277 S.E.2d 853 (1981).

Applied in *Edwards v. Latham*, — N.C. App. —, 299 S.E.2d 819 (1983).

Stated in *Abernathy v. Ralph Squires Realty Co.*, 55 N.C. App. 324, 285 S.E.2d 325 (1982); *Property Shop, Inc. v. Mountain City Inv. Co.*, 56 N.C. App. 644, 290 S.E.2d 222 (1982).

§ 93A-7. Power of courts to revoke.

Whenever any person, partnership, association or corporation claiming to have been injured or damaged by the gross negligence, incompetency, fraud, dishonesty or misconduct on the part of any licensee following the calling or engaging in the business herein described and shall file suit upon such claim against such licensee in any court of record in this State and shall recover judgment thereon, such court may as part of its judgment or decree in such case, if it deem it a proper case in which so to do, order a written copy of the transcript of record in said case to be forwarded by the clerk of court to the chairman of the said Commission with a recommendation that the licensee's certificate of license be revoked. (1957, c. 744, s. 7; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-9. Licensing nonresidents.

An applicant from another state, which offers licensing privileges to residents of North Carolina, may be licensed by conforming to all the provisions of this Chapter and, in the discretion of the Commission, such other terms and conditions as are required of North Carolina residents applying for license in such other state; provided that the Commission may exempt from the examination prescribed in G.S. 93A-4 a broker or salesman duly licensed in another state if a similar exemption is extended to licensed brokers and salesmen from North Carolina. (1957, c. 744, s. 9; 1967, c. 281, s. 5; 1969, c. 191, s. 6; 1971, c. 86, s. 3; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-10. Nonresident licensees; filing of consent as to service of process and pleadings.

Every nonresident applicant shall file an irrevocable consent that suits and actions may be commenced against such applicant in any of the courts of record of this State, by the service of any process or pleading authorized by the laws of this State in any county in which the plaintiff may reside, by serving the same on the Executive Director of the Commission, said consent stipulating and agreeing that such service of such process or pleadings on said Executive Director shall be taken and held in all courts to be valid and binding as if due service had been made personally upon the applicant in this State. This consent shall be duly acknowledged, and, if made by a corporation, shall be authenticated by its seal. An application from a corporation shall be accompanied by a duly certified copy of the resolution of the board of directors, authorizing the proper officers to execute it. In all cases where process or pleadings shall be served, under the provisions of this Chapter, upon the Executive Director of the Commission, such process or pleadings shall be served in duplicate, one of which shall be filed in the office of the Commission and the other shall be forwarded immediately by the Executive Director of the Commission, by registered mail, to the last known business address of the nonresident licensee against which such process or pleadings are directed. (1957, c. 744, s. 10; 1983, c. 81, ss. 3, 10.)

Effect of Amendments. — The 1983 amendment, effective Sept. 1, 1983, substituted "Executive Director of the Commission" for

"secretary of the commission" and substituted "Executive Director" for "secretary" throughout the section.

ARTICLE 2.

Real Estate Recovery Fund.

§ 93A-16. Real Estate Recovery Fund created; payment to fund; management.

(a) There is hereby created a special fund to be known as the "Real Estate Recovery Fund" which shall be set aside and maintained by the North Carolina Real Estate Commission. Said fund shall be used in the manner provided under this Article for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any person licensed under this Chapter.

(b) On September 1, 1979, the Commission shall transfer the sum of one hundred thousand dollars (\$100,000) from its expense reserve fund to the Real Estate Recovery Fund. Thereafter, if on December 31 of any year the amount remaining in the Real Estate Recovery Fund is less than fifty thousand dollars (\$50,000) the Commission may at its option replenish the fund from whatever funds it has or may determine that each licensee under this Chapter, when renewing his license, shall pay in addition to his license renewal fee, a fee not to exceed ten dollars (\$10.00) per broker and five dollars (\$5.00) per salesman as shall be determined by the Commission for the purpose of replenishing the fund.

(c) The Commission shall invest and reinvest the moneys in the Real Estate Recovery Fund in the same manner as provided by law for the investment of funds by the clerk of superior court. The proceeds from such investments shall be deposited to the credit of the fund. (1979, c. 614, s. 1; 1983, c. 81, ss. 1, 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Real Estate Commission" for "Real Estate

Licensing Board" in subsection (a) and "Commission" for "Board" throughout the section.

§ 93A-17. Application for payment out of fund; grounds.

(a) When any aggrieved person obtains final judgment in any court of competent jurisdiction against any real estate broker or salesman licensed under this Chapter on grounds of conversion of trust funds arising directly out of any transaction which occurred when such broker or salesman was licensed and acted in a capacity for which a license is required under this Chapter and which transaction occurred on or after September 1, 1979, such person may, upon termination of all proceedings including appeals, file a verified application in the court in which judgment was entered for an order directing payment out of the Real Estate Recovery Fund of the amount remaining unpaid upon the judgment which represents an actual and direct loss sustained by reason of said conversion of trust funds.

In case of a judgment rendered by a magistrate in a small claims action, the aggrieved person shall file such verified application in the district court. The district court judge may then make a determination as to whether such judgment rendered by a magistrate was based on facts constituting grounds for recovery under this Article and may enter an order directing payment of such judgment out of the Real Estate Recovery Fund.

A copy of the verified application shall be served upon the Commission and the judgment debtor and a certificate or affidavit of such service filed with the court. Jurisdiction of the court against the fund or the Commission shall not attach under this Article until after judgment is obtained against a licensee and execution is returned unsatisfied.

(c) For the purposes of Article 2 of this Chapter, the terms "licensee," "broker," and "salesman" shall include only individual persons licensed under this Chapter as brokers and salesmen and shall not include a corporation or other entity licensed under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, ss. 2, 14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

ment, effective September 1, 1983, added subsection (c). The amendment also substituted "Commission" for "Board" in the last paragraph of subsection (a).

Effect of Amendments. — The 1983 amend-

§ 93A-19. Answer and defense by Commission; proof of conversion.

(a) Whenever the court proceeds upon an application as set forth in this Article the Commission may defend such action on behalf of the fund and shall have recourse to all appropriate means of defense and review, including examination of witnesses. The judgment debtor may defend such action on his own behalf and shall have recourse to all appropriate means of defense and review, including examination of witnesses. At any time it appears there are no triable issues of fact and the application for an order directing payment from the fund is without merit, the court shall dismiss the application. Motion to dismiss may be supported by affidavit of any person or persons having knowledge of the facts and may be made on the basis that the application and the judgment referred to therein do not form the basis for a meritorious recovery within the purview of G.S. 93A-17 or that the applicant has not complied with the provi-

sions of G.S. 93A-18; provided, however, notice of such motion shall be given at least 10 days prior to the time fixed for hearing.

(1979, c. 614, s. 1; 1983, c. 81, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-20. Order directing payment out of fund; compromise of claims.

If the court finds after said hearing that the claim should be levied against the fund, the court shall enter an order directed to the Commission requiring payment from the fund of whatever sum the court shall find to be payable upon the claim in accordance with the limitations contained in this Article. The Commission may, subject to court approval, compromise a claim based upon the application of an aggrieved party; however, the Commission shall not be bound in any way by any prior compromise or stipulation of the judgment debtor. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-21. Maximum liability; pro rata distribution; attorney fees.

(a) Payments from the Real Estate Recovery Fund shall be subject to the following limitations:

- (1) The right to recovery under this Article shall be forever barred unless application is made within one year after termination of all proceedings including appeals, in connection with the judgment;
- (2) The fund shall not be liable for more than ten thousand dollars (\$10,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction; and
- (3) The liability of the fund shall not exceed in the aggregate ten thousand dollars (\$10,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregate twenty thousand dollars (\$20,000) for any one licensee.

(b) If the maximum liability of the fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the court deems equitable. Upon petition of the Commission, the court may require all claimants and prospective claimants to be joined in one action to the end that the respective rights of all such claimants to the Real Estate Recovery Fund may be equitably adjudicated and settled.

(1979, c. 614, s. 1; 1983, c. 81, ss. 2, 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted

"ten thousand dollars (\$10,000)" for "five thousand dollars (\$5,000)" in subdivision (a)(2) and substituted "Commission" for "Board" in subsection (b).

§ 93A-22. Repayment to fund; automatic suspension of license.

Should the Commission pay from the Real Estate Recovery Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or salesman, the license of the broker or salesman shall be automatically suspended upon the effective date of an order by the court authorizing payment from the fund. No such broker or salesman shall be granted a reinstatement until he has repaid in full, plus interest at the legal rate as provided for in G.S. 24-1, the amount paid from the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-23. Subrogation of rights.

When, upon order of the court, the Commission has paid from the Real Estate Recovery Fund any sum to the judgment creditor, the Commission shall be subrogated to all of the rights of the judgment creditor to the extent of the amount so paid and the judgment creditor shall assign all his right, title, and interest in the judgment to the extent of the amount so paid to the Commission and any amount and interest so recovered by the Commission on the judgment shall be deposited in the Real Estate Recovery Fund. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-26. Disciplinary action against licensee.

Nothing contained in this Article shall limit the authority of the Commission to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter. (1979, c. 614, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

ARTICLE 3.

Private Real Estate Schools.

§ 93A-32. Definitions.

As used in this Article:

(1) "Commission" means the North Carolina Real Estate Commission. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board" and "Real Estate

Commission" for "Real Estate Licensing Board" in subdivision (1).

§ 93A-33. Commission to administer Article; authority of Commission to conduct investigations, issue licenses, and promulgate regulations.

The Commission shall have authority to administer and enforce this Article and to issue licenses to private real estate schools as defined herein which have complied with the requirements of this Article and regulations promulgated by the Commission. Through licensing applications, periodic reports required of licensed schools, periodic investigations and inspections of schools, and appropriate regulations, the Commission shall exercise general supervisory authority over private real estate schools, the object of such supervision being to protect the public interest and to assure the conduct of quality real estate education programs. To this end the Commission is authorized and directed to promulgate such regulations as it deems necessary which are not inconsistent with the provisions of this Article and which relate to the subject areas set out in G.S. 93A-34(c). (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-34. License required; application for license; fees; requirements for issuance of license.

(a) No person, partnership, corporation or association shall operate or maintain or offer to operate in this State a private real estate school as defined herein unless a license is first obtained from the Commission in accordance with the provisions of this Article and the rules and regulations promulgated by the Commission under this Article. For licensing purposes, each branch location where a school conducts courses shall be considered a separate school requiring a separate license.

(b) Application for a license shall be filed in the manner and upon the forms prescribed by the Commission for that purpose. Such application shall be accompanied by a nonrefundable application fee of two hundred fifty dollars (\$250.00) in the form of a certified check or money order payable to the North Carolina Real Estate Commission, shall be signed by the applicant, and shall contain the following:

- (1) Name and address of the applicant and the school;
- (2) Names, biographical data, and qualifications of director, administrators and instructors;
- (3) Description of school facilities and equipment;
- (4) Description of course(s) to be offered and instructional materials to be utilized;
- (5) Information on financial resources available to equip and operate the school;
- (6) Information on school policies and procedures regarding administration, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct;
- (7) Copies of bulletins, catalogues and other official publications;
- (8) Copy of bond required by G.S. 93A-36;

- (9) Such additional information as the Commission may deem necessary to enable it to determine the adequacy of the instructional program and the ability of the applicant to operate a school in such a manner as would best serve the public interest.

(c) After due investigation and consideration by the Commission, a license shall be issued to the applicant when it is shown to the satisfaction of the Commission that the applicant and school are in compliance with the following standards, as well as the requirements of any supplemental regulations of the Commission regarding these standards:

- (1) The program of instruction is adequate in terms of quality, content and duration.
- (2) The director, administrators and instructors are adequately qualified by reason of education and experience.
- (3) There are adequate facilities, equipment, instructional materials and instructor personnel to provide instruction of good quality.
- (4) The school has adopted adequate policies and procedures regarding administration, instruction, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct.
- (5) The school publishes and provides to all students upon enrollment a bulletin, catalogue or similar official publication which is certified as being true and correct in content and policy by an authorized school official, and which contains the following information:
 - a. Identifying data and publication date;
 - b. Name(s) of school and its full-time officials and faculty;
 - c. School's policies and procedures relating to entrance requirements, registration, grades, student progress, attendance, student conduct and refund of tuition and fees;
 - d. Detailed schedule of tuition and fees;
 - e. Detailed course outline of all courses offered.
- (6) Adequate records as prescribed by the Commission are maintained in regard to grades, attendance, registration and financial operations.
- (7) Institutional standards relating to grades, attendance and progress are enforced in a satisfactory manner.
- (8) The applicant is financially sound and capable of fulfilling educational commitments made to students.
- (9) The school's owner(s), director, administrators and instructors are of good reputation and character.
- (10) The school complies with all applicable local, State and federal laws and regulations regarding safety and sanitation of facilities.
- (11) The school does not utilize advertising of any type which is false or misleading, either by actual statement, omission or intimation.
- (12) Such additional standards as may be deemed necessary by the Commission to assure the conduct of adequate instructional programs and the operation of schools in a manner which will best serve the public interest. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2.)

Effect of Amendments.—The 1983 amendment, effective September 1, 1983, substituted "Real Estate Commission" for "Real Estate

Licensing Board" in subsection (b) and "Commission" for "Board" throughout the section.

§ 93A-35. Duration and renewal of licenses; transfer of school ownership.

(b) Licenses shall be renewable annually on July 1, provided a renewal application accompanied by a certified check or money order for the renewal fee in the amount of one hundred dollars (\$100.00) payable to the North Carolina Real Estate Commission has been filed in the form and manner prescribed by the Commission; and provided further that the applicant and school are found to be in compliance with the standards established for issuance of an original license.

(c) In the event a school is sold or ownership is otherwise transferred, the license issued to the original owner is not transferable to the new owner. Such new owner must make application for an original license as prescribed by this Article and Commission regulations. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amend-

ment, effective September 1, 1983, substituted "Real Estate Commission" for "Real Estate Licensing Board" in subsection (b) and "Commission" for "Board" in subsections (b) and (c).

§ 93A-36. Execution of bond required; applicability to branch schools; actions upon bond.

(a) Before the Commission shall issue a license the applicant shall execute a bond in the sum of five thousand dollars (\$5,000), payable to the State of North Carolina, signed by a solvent guaranty company authorized to do business in the State of North Carolina, and conditioned that the principal in said bond will carry out and comply with each and every contract or agreement, written or verbal, made and entered into by the applicant's school acting by and through its officers and agents with any student who desires to enter such school and to take any courses offered therein and that said principal will refund to such students all amounts collected in tuition and fees in case of failure on the part of the party obtaining a license from the Commission to open and operate a private real estate school or to provide the instruction agreed to or contracted for. Such bond shall be required for each school or branch thereof for which a license is required and shall be first approved by the Commission and then filed with the clerk of superior court of the county in which the school is located, to be recorded by such clerk in a book provided for that purpose.

(b) In any and all cases where the party licensed by the Commission fails to fulfill its obligations under any contract or agreement, written or verbal, made and entered into with any student, then the State of North Carolina, upon the relation of the student(s) entering into said contract or agreement, shall have a cause of action against the principal and surety on the bond herein required for the full amount of payments made to such party, plus court costs and six percent (6%) interest from the date of payment of said amount. Such suits shall be brought in Wake County Superior Court within one year of the alleged default. (1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2.)

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

§ 93A-38. Suspension, revocation or denial of license.

The Commission shall have the power to suspend, revoke, deny issuance, or deny renewal of license to operate a private real estate school. In all proceedings to suspend, revoke or deny a license, the provisions of Chapter 150A of the General Statutes shall be applicable. The Commission may suspend, revoke, or deny such license when it finds:

- (2) That the applicant for or holder of such license has knowingly presented to the Commission false or misleading information relating to matters within the purview of the Commission under this Article;
- (5) That the applicant for or holder of such license has at any time refused to permit authorized representatives of the Commission to inspect the school, or failed to make available to them upon request full information relating to matters within the purview of the Commission under the provisions of this Article or the rules or regulations promulgated thereunder; or

(1979, 2nd Sess., c. 1193, s. 1; 1983, c. 81, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective September 1, 1983, substituted "Commission" for "Board."

ARTICLE 4.

Time Shares.

§ 93A-39. (Effective July 1, 1984) Title.

This Article shall be known and may be cited as the "North Carolina Time Share Act." (1983, c. 814.)

Editor's Note. — Session Laws 1983, c. 814, s. 2, makes §§ 93A-51, 93A-52, and 93A-53 effective Jan. 1, 1984, and provides that all

additional sections shall become effective July 1, 1984.

§ 93A-40. (Effective July 1, 1984) Registration required of time share projects; real estate salesmen license required.

From and after July 1, 1984, it shall be unlawful for any person in this State to engage or assume to engage in the business of a time share salesman without first obtaining a real estate broker or salesman license issued by the North Carolina Real Estate Commission under the provisions of Article I of this Chapter, and it shall be unlawful for a time share developer to sell or offer to sell a time share located in this State without first obtaining a certificate of registration for the time share project to be offered for sale issued by the North Carolina Real Estate Commission under the provisions of this Article. (1983, c. 814.)

§ 93A-41. (Effective July 1, 1984) Definitions.

When used in this Article, unless the context otherwise requires, the term:

- (1) "Commission" means the North Carolina Real Estate Commission;
- (2) "Developer" means any person or entity which creates or is engaged in the business of selling its own time shares and shall include any

person or entity who controls, is controlled by, or is in common control with the developer which is engaged in creating or selling time shares for the developer;

- (3) "Enrolled" means paid membership in exchange programs or membership in an exchange program evidenced by written acceptance or confirmation of membership;
- (4) "Exchange company" means any person operating an exchange program;
- (5) "Exchange program" means any opportunity or procedure for the assignment or exchange of time shares among purchasers in the same or other time share project;
- (6) "Managing agent" means a person who undertakes the duties, responsibilities, and obligations of the management of a time share program;
- (7) "Person" means one or more natural persons, corporations, partnerships, associations, trusts, other entities, or any combination thereof;
- (8) "Purchaser" means any person other than a developer or lender who owns or acquires an interest or proposes to acquire an interest in a time share;
- (9) "Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership, or vacation bond;
- (10) "Time share program" means any arrangement for time shares whereby real property has been made subject to a time share;
- (11) "Time share project" means any real property that is subject to a time share program;
- (12) "Time share salesman" means a person who sells or offers to sell on behalf of a developer a time share to a purchaser; and
- (13) "Time share unit" or "unit" means the real property or real property improvement in a project which is divided into time shares and designated for separate occupancy and use. (1983, c. 814.)

§ 93A-42. (Effective July 1, 1984) Time shares deemed real estate.

(a) A time share is deemed to be an interest in real estate, and shall be governed by the law of this State relating to real estate.

(b) A purchaser of a time share may in accordance with G.S. 47-18 register the instrument by which he acquired his interest and upon such registration shall be entitled to the protection provided by Chapter 47 of the General Statutes for the recordation of other real property instruments. A document transferring or encumbering a time share shall not be rejected for recordation because of the nature or duration of that estate, provided all other requirements necessary to make an instrument recordable are complied with. (1983, c. 814.)

§ 93A-43. (Effective July 1, 1984) Partition.

When a time share is owned by two or more persons as tenants in common or as joint tenants either may seek a partition by sale of that interest but no purchaser of a time share may maintain an action for partition by sale or in kind of the unit in which such time share is held. (1983, c. 814.)

§ 93A-44. (Effective July 1, 1984) Public offering statement.

Each developer shall fully and conspicuously disclose in a public offering statement:

- (1) The total financial obligation of the purchaser, which shall include the initial purchase price and any additional charges to which the purchaser may be subject;
- (2) Any person who has or may have the right to alter, amend or add to charges to which the purchaser may be subject and the terms and conditions under which such charges may be imposed;
- (3) The nature and duration of each agreement between the developer and the person managing the time share program or its facilities;
- (4) The date of availability of each amenity and facility of the time share program when they are not completed at the time of sale of a time share;
- (5) The specific term of the time share;
- (6) The purchaser's right to cancel within five days of execution of the contract and how that right may be exercised under G.S. 93A-45;
- (7) A statement that under North Carolina law an instrument conveying a time share must be recorded in the Register of Deeds Office to protect that interest; and
- (8) Any other information which the Commission may by rule require.

The public offering statement shall also contain a one page cover containing a summary of the text of the statement. (1983, c. 814.)

§ 93A-45. (Effective July 1, 1984) Purchaser's right to cancel; escrow; violation.

(a) A developer shall, before transfer of a time share and no later than the date of any contract of sale, provide a prospective purchaser with a copy of a public offering statement containing the information required by G.S. 93A-44. The contract of sale is voidable by the purchaser for five days after the execution of the contract. The contract shall conspicuously disclose the purchaser's right to cancel under this subsection and how that right may be exercised. An instrument transferring a time share shall not be recorded until five days after the execution of the contract of sale.

(b) A purchaser may elect to cancel within the time period set out in subsection (a) by hand delivering or by mailing notice to the developer or the time share salesman. Cancellation under this section is without penalty and upon receipt of the notice all payments made prior to cancellation must be refunded immediately.

(c) Any payments received by a time share developer or time share salesman in connection with the sale of the time share shall be immediately deposited by such developer or salesman in a trust or escrow account in an insured bank or savings and loan association in North Carolina and shall remain in such account for 10 days or cancellation by the purchaser, whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the developer. In lieu of such escrow requirements, the Commission shall have the authority to accept, in its discretion, alternative financial assurances adequate to protect the purchaser's interest during the contract cancellation period, including but not limited to a surety bond, corporate bond, cash deposit or irrevocable letter of credit in an amount equal to the escrow requirements.

(d) If a developer fails to provide a purchaser to whom a time share is transferred with the statement as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from the

developer an amount equal to ten percent (10%) of the sales price of the time share not to exceed three thousand dollars (\$3,000). A receipt signed by the purchaser stating that he has received the statement required by subsection (a) is prima facie evidence of delivery of such statement. (1983, c. 814.)

§ 93A-46. (Effective July 1, 1984) Prizes.

An advertisement of a time share which includes the offer of a prize or other inducement shall fully comply with the provisions of Chapter 75 of the General Statutes. (1983, c. 814.)

§ 93A-47. (Effective July 1, 1984) Time shares proxies.

No proxy, power of attorney of similar device given by the purchaser of a time share regarding the management of the time share program or its facilities shall exceed one year in duration, but the same may be renewed from year to year. (1983, c. 814.)

§ 93A-48. (Effective July 1, 1984) Exchange programs.

(a) If a purchaser is offered the opportunity to subscribe to any exchange program, the developer shall, except as provided in subsection (b), deliver to the purchaser, prior to the execution of (i) any contract between the purchaser and the exchange company, and (ii) the sales contract, at least the following information regarding such exchange program:

- (1) The name and address of the exchange company;
- (2) The names of all officers, directors, and shareholders owning five percent (5%) or more of the outstanding stock of the exchange company;
- (3) Whether the exchange company or any of its officers or directors has any legal or beneficial interest in any developer or managing agent for any time share project participating in the exchange program and, if so, the name and location of the time share project and the nature of the interest;
- (4) Unless the exchange company is also the developer a statement that the purchaser's contract with the exchange company is a contract separate and distinct from the sales contract;
- (5) Whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time share project with the exchange program;
- (6) Whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;
- (7) A complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange company and the procedure by which changes thereto may be made;
- (8) A complete and accurate description of the procedure to qualify for and effectuate exchanges;
- (9) A complete and accurate description of all limitations, restrictions, or priorities employed in the operation of the exchange program, including, but not limited to, limitations on exchanges based on seasonality, unit size, or levels of occupancy, expressed in boldfaced type, and, in the event that such limitations, restrictions, or priorities are not uniformly applied by the exchange program, a clear description of the manner in which they are applied;
- (10) Whether exchanges are arranged on a space available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;

- (11) Whether and under what circumstances an owner, in dealing with the exchange company, may lose the use and occupancy of his time share in any properly applied for exchange without his being provided with substitute accommodations by the exchange company;
- (12) The expenses, fees or range of fees for participation by owners in the exchange program, a statement whether any such fees may be altered by the exchange company, and the circumstances under which alterations may be made;
- (13) The name and address of the site of each time share project or other property which is participating in the exchange program;
- (14) The number of units in each project or other property participating in the exchange program which are available for occupancy and which qualify for participation in the exchange program, expressed within the following numerical groupings, 1-5, 6-10, 11-20, 21-50 and 51, and over;
- (15) The number of owners with respect to each time share project or other property which are eligible to participate in the exchange program expressed within the following numerical groupings, 1-100, 101-249, 250-499, 500-999, and 1,000 and over, and a statement of the criteria used to determine those owners who are currently eligible to participate in the exchange program;
- (16) The disposition made by the exchange company of time shares deposited with the exchange program by owners eligible to participate in the exchange program and not used by the exchange company in effecting exchanges;
- (17) The following information which, except as provided in subsection (b) below, shall be independently audited by a certified public accountant in accordance with the standards of the Accounting Standards Board of the American Institute of Certified Public Accountants and reported for each year no later than July 1, of the succeeding year:
 - a. The number of owners enrolled in the exchange program and such numbers shall disclose the relationship between the exchange company and owners as being either fee paying or gratuitous in nature;
 - b. The number of time share projects or other properties eligible to participate in the exchange program categorized by those having a contractual relationship between the developer or the association and the exchange company and those having solely a contractual relationship between the exchange company and owners directly;
 - c. The percentage of confirmed exchanges, which shall be the number of exchanges confirmed by the exchange company divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange requested was properly applied for;
 - d. The number of time shares or other intervals for which the exchange company has an outstanding obligation to provide an exchange to an owner who relinquished a time share or interval during the year in exchange for a time share or interval in any future year; and
 - e. The number of exchanges confirmed by the exchange company during the year; and
- (18) A statement in boldfaced type to the effect that the percentage described in subparagraph (17)c. of subsection (a) is a summary of the exchange requests entered with the exchange company in the period reported and that the percentage does not indicate a purchaser's/owner's probabilities of being confirmed to any specific choice

or range of choices, since availability at individual locations may vary.

The purchaser shall certify in writing to the receipt of the information required by this subsection and any other information which the Commissioners may by rule require.

- (b) The information required by subdivisions (a), (2), (3), (13), (14), (15), and (17) shall be accurate as of December 31 of the year preceding the year in which the information is delivered, except for information delivered within the first 180 days of any calendar year which shall be accurate as of December 31 of the year two years preceding the year in which the information is delivered to the purchaser. The remaining information required by subsection (a) shall be accurate as of a date which is no more than 30 days prior to the date on which the information is delivered to the purchaser.
- (c) In the event an exchange company offers an exchange program directly to the purchaser or owner, the exchange company shall deliver to each purchaser or owner, concurrently with the offering and prior to the execution of any contract between the purchaser or owner and the exchange company the information set forth in subsection (a) above. The requirements of this paragraph shall not apply to any renewal of a contract between an owner and an exchange company.
- (d) All promotional brochures, pamphlets, advertisements, or other materials disseminated by the exchange company to purchasers in this State which contain the percentage of confirmed exchanges described in (a)(17)c. must include the statement set forth in (a)(18). (1983, c. 814.)

§ 93A-49. (Effective July 1, 1984) Service of process on exchange company.

Any exchange company offering an exchange program to a purchaser shall be deemed to have made an irrevocable appointment of the Commission to receive service of lawful process in any proceeding against the exchange company arising under this Article. (1983, c. 814.)

§ 93A-50. (Effective July 1, 1984) Securities laws apply.

The North Carolina Securities Act, Chapter 78A, shall also apply, in addition to the laws relating to real estate, to time shares deemed to be investment contracts or to other securities offered with or incident to a time share; provided, in the event of such applicability of the North Carolina Securities Act, any offer or sale of time shares registered under this Article shall not be subject to the provisions of G.S. 78A-24 and any real estate broker or salesman registered under Article 1 of this Chapter shall not be subject to the provisions of G.S. 78A-36. (1983, c. 814.)

§ 93A-51. Rule-making authority.

The Commission shall have the authority to adopt rules and regulations that are not inconsistent with the provisions of this Article and the General Statutes of North Carolina. The Commission may prescribe forms and procedures for submitting information to the Commission. (1983, c. 814.)

Editor's Note. — Session Laws 1983, c. 814, s. 2, makes §§ 93A-51, 93A-52, and 93A-53 effective Jan. 1, 1984, and provides that all additional sections shall become effective July 1, 1984.

§ 93A-52. Application for registration of time share project; denial of registration; renewal; reinstatement; and termination of developer's interest.

(a) Prior to the offering in this State of any time share located in this State, the developer of the time share project shall make written application to the Commission for the registration of the project. The application shall be accompanied by a fee in an amount fixed by the Commission but not to exceed fifteen hundred dollars (\$1500), and shall include a description of the project, copies of proposed time share instruments including public offering statements, sale contracts, deeds, and other documents referred to therein, information pertaining to any marketing or managing entity to be employed by the developer for the sale of time shares in a time share project or the management of the project, information regarding any exchange program available to the purchaser, an irrevocable appointment of the Commission to receive service of any lawful process in any proceeding against the developer or the developer's salesmen arising under this Article, and such other information as the Commission may by rule require.

Upon receipt of a properly completed application and fee and upon a determination by the Commission that the sale and management of the time shares in the time share project will be directed and conducted by persons of good moral character, the Commission shall issue to the developer a certificate of registration authorizing the developer to offer time shares in the project for sale. The Commission shall within 15 days after receipt of an incomplete application, notify the developer by mail that the Commission has found specified deficiencies, and shall, within 45 days after the receipt of a properly completed application, either issue the certificate of registration or notify the developer by mail of any specific objections to the registration of the project. The certificate shall be prominently displayed in the office of the developer on the site of the project.

The developer shall promptly report to the Commission any and all changes in the information required to be submitted for the purpose of the registration. The developer shall also immediately furnish the Commission complete information regarding any change in its interest in a registered time share project. In the event a developer disposes of, or otherwise terminates its interest in a time share project, the developer shall certify to the commission in writing that its interest in the time share project is terminated and shall return to the Commission for cancellation the certificate of registration.

(b) In the event the Commission finds that there is substantial reason to deny the application for registration as a time share project, the commission shall notify the applicant that such application has been denied and shall afford the applicant an opportunity for a hearing before the Commission to show cause why the application should not be denied. In all proceedings to deny a certificate of registration, the provisions of Chapter 150A of the General Statutes shall be applicable.

(c) The acceptance by the Commission of an application for registration shall not constitute the approval of its contents or waive the authority of the Commission to take disciplinary action as provided by this Article.

(d) All certificates of registration granted and issued by the Commission under the provisions of this Article shall expire on the 30th day of June following issuance thereof, and shall become invalid after such date unless reinstated. Renewal of such certificate may be effected at any time during the

month of June preceding the date of expiration of such registration upon proper application to the Commission and by the payment of a renewal fee fixed by the Commission but not to exceed seven hundred fifty dollars (\$750.00) for each time share project. The developer shall, when making application for renewal, also provide a copy of the report required in G.S. 93A-48. Each certificate reinstated after the expiration date thereof shall be subject to a late filing fee of fifty dollars (\$50.00) in addition to the required renewal fee. In the event a time share developer fails to reinstate the registration within 12 months after the expiration date thereof, the Commission may, in its discretion, consider the time share project as not having been previously registered, and thereby subject to the provisions of this Article relating to the issuance of an original certificate. Duplicate certificates may be issued by the Commission upon payment of a fee of one dollar (\$1.00) by the registrant developer. (1983, c. 814.)

Editor's Note. — Session Laws 1983, c. 814, s. 2, makes §§ 93A-51, 93A-52, and 93A-53 effective Jan. 1, 1984, and provides that all additional sections shall become effective July 1, 1984.

§ 93A-53. Register of applicants; roster of registrants; registered projects; financial report to Secretary of State.

(a) The Executive Director of the Commission shall keep a register of all applicants for certificates of registration, showing for each the date of application, name, business address, and whether the certificate was granted or refused.

(b) The Executive Director of the Commission shall also keep a current roster showing the name and address of all time share projects registered with the Commission. The roster shall be kept on file in the office of the Commission and be open to public inspection.

(c) On or before the first day of September of each year, the Commission shall file with the Secretary of State a copy of the roster of time share projects registered with the Commission and a report containing a complete statement of income received by the Commission in connection with the registration of time share projects for the preceding fiscal year ending June 30th attested by the affidavit of the Executive Director of the Commission. The report shall be made a part of those annual reports required under the provisions of G.S. 93A-5. (1983, c. 814.)

Editor's Note. — Session Laws 1983, c. 814, s. 2, makes §§ 93A-51, 93A-52, and 93A-53 effective Jan. 1, 1984, and provides that all additional sections shall become effective July 1, 1984.

§ 93A-54. (Effective July 1, 1984) Disciplinary action by Commission.

(a) The Commission shall have power to take disciplinary action. Upon its own motion, or on the verified complaint of any person, the Commission may investigate the actions of any time share salesman or any developer of a time share project registered under this Article, or any other person or entity who shall assume to act in such capacity. If the Commission finds probable cause that a time share salesman or developer has violated any of the provisions of this Article, the Commission may hold a hearing on the allegations of misconduct. All such hearings shall be conducted in accordance with the provisions of Chapter 150A of the General Statutes.

The Commission shall have power to suspend or revoke at any time a real estate license issued to a time share salesman or a certificate of registration of a time share project issued to a developer, or to reprimand or censure such salesman or developer, or to fine such developer in the amount of five hundred dollars (\$500.00) for each violation of this Article, if, after a hearing, the Commission adjudges either the salesman or developer to be guilty of:

- (1) Making any willful or negligent misrepresentation or any willful or negligent omission of material fact about any time share or time share project;
- (2) Making any false promises of a character likely to influence, persuade, or induce;
- (3) Pursuing a course of misrepresentation or making of false promises through agents, salesman, advertising or otherwise;
- (4) Failing, within a reasonable time, to account for all money received from others in a time share transaction, and failing to remit such monies as may be required in G.S. 93A-45 of this Article;
- (5) Acting as a time share salesman or time share developer in a manner as to endanger the interest of the public;
- (6) Paying a commission, salary, or other valuable consideration to any person for acts or services performed in violation of this Article;
- (7) Any other conduct which constitutes improper, fraudulent, or dishonest dealing;
- (8) Performing or undertaking to perform any legal service as set forth in G.S. 84-2.1, or any other acts not specifically set forth in that section;
- (9) Failing to deposit and maintain in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received from others in a time share transaction as may be required in G.S. 93A-45 of this Article;
- (10) Failing to deliver to a purchaser a public offering statement containing the information required by G.S. 93A-44 and any other disclosures that the Commission may by regulation require;
- (11) Failing to comply with the provisions of Chapter 75 of the General Statutes in the advertising or promotion of time shares for sale, or failing to assure such compliance by persons engaged on behalf of a developer;
- (12) Failing to comply with the provisions of G.S. 93A-48 in furnishing complete and accurate information to purchasers concerning any exchange program which may be offered to such purchaser;
- (13) Making any false or fraudulent representation on an application for registration; or
- (14) Violating any rule or regulation promulgated by the Commission.

(b) Following a hearing, the Commission shall also have power to suspend or revoke any certificate of registration issued under the provisions of this Article or to reprimand or censure any developer when the registrant has been convicted or has entered a plea of guilty or no contest upon which final judgment is entered by a court of competent jurisdiction in this State, or any other state, of the criminal offenses of: embezzlement, obtaining money under false pretense, fraud, forgery, conspiracy to defraud, or any other offense involving moral turpitude which would reasonably affect the developer's performance in the time share business.

(c) The Commission may appear in its own name in superior court in actions for injunctive relief to prevent any person or entity from violating the provisions of this Article or rules promulgated by the Commission. The superior court shall have the power to grant these injunctions even if criminal prosecution has been or may be instituted as a result of the violations, or regardless of whether the person or entity has been registered by the Commission.

(d) Each developer shall maintain or cause to be maintained complete records of every time share transaction including records pertaining to the deposit, maintenance, and withdrawal of money required to be held in a trust or escrow account, or as otherwise required by the Commission, under G.S. 93A-45 of this Article. The Commission may inspect these records periodically without prior notice and may also inspect these records whenever the Commission determines that they are pertinent to an investigation of any specific complaint against a registrant. (1983, c. 814.)

§ 93A-55. (Effective July 1, 1984) Private enforcement.

The provisions of the Article shall not be construed to limit in any manner the right of a purchaser or other person injured by a violation of this Article to bring a private action. (1983, c. 814.)

§ 93A-56. (Effective July 1, 1984) Penalty for violation of Article.

Any person violating the provisions of this Article shall, upon conviction thereof, be deemed guilty of a misdemeanor and shall be punished by a fine or imprisonment, or by both fine and imprisonment, in the discretion of the court. (1983, c. 814.)

§ 93A-57. (Effective July 1, 1984) Release of liens.

(a) Prior to any recordation of the instrument transferring a time share the developer shall record or furnish to the purchaser a release of all liens affecting that time share or shall provide a surety bond or insurance against the lien from a company acceptable to the Commission as provided for liens on real estate in this State, or such underlying lien document shall contain a provision wherein the lien holder subordinates its rights to that of a time share purchaser who fully complies with all of the provisions and terms of the contract of sale.

(b) Unless a time share owner or a time share owner who is his predecessor in title agree otherwise with the lienor, if a lien other than a mortgage or deed of trust becomes effective against more than one time share in a time share project, any time share owner is entitled to a release of his time share from a lien upon payment of the amount of the lien attributable to his time share. The amount of the payment must be proportionate to the ratio that the time share owner's liability bears to the liabilities of all time share owners whose interests are subject to the lien. Upon receipt of payment, the lien holder shall promptly deliver to the time share owner a release of the lien covering that time share. After payment, the managing agent may not assess or have a lien against that time share for any portion of the expenses incurred in connection with that lien. (1983, c. 814.)

Chapter 93B.

Occupational Licensing Boards.

Sec.

93B-4. Audit of Occupational Licensing Boards; payment of costs.

93B-5. Compensation and employment of board members.

Sec.

93B-11. Interest from State Treasurer's Investment Program.

§ 93B-4. Audit of Occupational Licensing Boards; payment of costs.

The books, records, and operations of each occupational licensing board shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes.

The cost of all audits shall be paid from funds of the occupational licensing board audited. (1957, c. 1377, s. 4; 1965, c. 661; 1973, c. 1301; 1983, c. 913, s. 11.)

Effect of Amendments. — The 1983 amendment, effective July 22, 1983, rewrote this section, deleting provisions relating to the submission to the Legislative Services Office of

copies of the audit report and the issuance and submission of copies of an annual report containing a summary of the financial operations of each occupational licensing board.

§ 93B-5. Compensation and employment of board members.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Session Laws 1981, c. 757, s. 2.

(1957, c. 1377, s. 5; 1973, c. 1303, s. 1; c. 1342, s. 1; 1975, c. 765, s. 1; 1981, c. 757, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment deleted a reference to subdivisions (1), (2)

and (3) of § 138-6(a) in the first sentence of subsection (b), added the second sentence of subsection (b), and deleted subsection (c), which authorized reimbursement for convention registration fees.

§ 93B-11. Interest from State Treasurer's Investment Program.

Any interest earned by an occupational licensing board under G.S. 147-69.3(d) may be used only for the following purposes:

(1) To reduce fees;

- (2) Improve services offered to licensees and the public; or
- (3) For educational purposes to benefit licensees or the public. (1983, c. 515, s. 2.)

Editor's Note. — Session Laws 1983, c. 515, s. 3, makes this section effective with respect to any interest credited on or after ratification of the act. The act was ratified June 13, 1983.

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.

93D-2. Fitting and selling without license unlawful.

93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

93D-4. Board may enjoin illegal practices.

93D-5. Requirements for registration; examinations; apprentice licenses.

93D-6. Persons selling in other jurisdictions.

93D-8. Examination of applicants; issue of license certificate.

Sec.

93D-9. Registration of apprentices.

93D-10. Registration and notice.

93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

93D-12. License to be displayed at office.

93D-13. Discipline, suspension, revocation of licenses.

93D-15. Violation of Chapter.

Repeal of Chapter. —

Session Laws 1981, c. 601, s. 21, amended § 143-34.13 (codified from Session Laws 1977, c. 712, s. 4, as amended) so as to eliminate the

provision repealing this Chapter. Section 143-34.13 was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 93D-2. Fitting and selling without license unlawful.

It shall be unlawful for any person to fit or sell hearing aids unless he has first obtained a license from the North Carolina State Hearing Aid Dealers and Fitters Board or is an apprentice working under the supervision of a board licensee. (1969, c. 999; 1981, c. 601, s. 1.)

Effect of Amendments. — The 1981 amendment deleted "or apprentice license" following "license" and added "or is an apprentice

working under the supervision of a board licensee."

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been actively engaged in the fitting and selling of hearing aids for three years shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All appointments made on or after July 1, 1981, shall be for terms of three years.

One member shall be appointed by the Governor who shall be a physician practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of three years.

One member shall be appointed by the Governor from a list of two audiologists residing in North Carolina, which list shall be compiled by the North Carolina Speech and Hearing Association. This initial appointment shall be for a term of three years. All appointments made on or after July 1, 1981, shall be for a term of three years.

One member shall be appointed by the Governor to represent the interest of the public at large. This member shall have no ties to the hearing aid business nor shall he be an audiologist. The Governor shall appoint the public member not later than July 1, 1981, to serve a term of three years.

All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive terms.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve the unexpired term of their predecessor in office and must be appointed from the same category as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

(b) The Board shall choose, at the first regular meeting and annually thereafter, one of its members to serve as president and one as secretary and treasurer. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of the annual meeting and any special meetings to be designated by the president. The secretary and treasurer of the Board shall keep a full record of its proceedings, including a current list of all licensees, which shall at all reasonable times be open to public inspection. The Board is authorized to employ an executive secretary and to provide such assistance as may be required to enable said Board to properly perform its duties.

(c) The Board shall:

- (1) Authorize all disbursements necessary to carry out the provisions of this Chapter;
- (2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;
- (3) Issue licenses to qualified persons who apply to the Board;
- (4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;
- (5) Suspend or revoke licenses pursuant to this Chapter;
- (6) Make and publish rules and regulations (including a code of ethics) which are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;
- (7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules or regulations, which are made against any fitter and seller of hearing aids in North Carolina;
- (8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;
- (9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to compel their attendance and the production of books, papers, or other documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges in

the manner set forth in Chapter 150A of the General Statutes. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;

- (10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity whatsoever in connection with the sales and service of hearing aids;
- (11) Establish and enforce regulations which will guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;
- (12) Fund, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary;
- (13) Register persons serving as apprentices as set forth in G.S. 93D-9.

(d) Out of the funds coming into the possession of said Board, each member thereof may receive as reimbursement for each day he is actually engaged in the assigned duties of his office, the sum of eight cents (8¢) per mile for travel plus the actual costs of meals and public lodging while away from home, which costs of meals and lodging may not exceed twenty dollars (\$20.00) per day. Such expenses shall be paid from the fees and assessments received by the Board under the provisions of this Chapter. No part of these expenses or any other expenses of the Board, in any manner whatsoever, shall be paid out of the State treasury. All moneys received in excess of expense allowance and mileage, as above provided, shall be held by the secretary-treasurer as a special fund for meeting other expenses of the Board and carrying out the provisions of this Chapter.

The secretary-treasurer shall give a bond to the Board to be approved by the Board, in the sum of five thousand dollars (\$5,000) conditioned upon the faithful performance of the duties of his office.

The Board shall make an annual report of its proceedings to the Governor on the first Monday in June of each year, which report shall contain an account of all moneys received and disbursed by the Board and a complete listing of names and addresses of all licensees and apprentices. Copies of the report and list of licensees and apprentices shall be filed in the office of the State Auditor, the Secretary of State, and Attorney General. (1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1; 1981, c. 601, ss. 2-5.)

Effect of Amendments. — The 1981 amendment, in the last sentence of the first paragraph of subsection (a), deleted "subsequent" preceding "appointments," inserted "made on or after July 1, 1981" and substituted "three" for "four." In the second paragraph of subsection (a), the amendment substituted "One member" for "Two members" and "a physician" for "physicians" in the first sentence and substituted "three" for "four" in the second sentence. The amendment deleted "subsequent" preceding "appointment," added "made on or after July 1, 1981" and substituted "three" for "two" in the last sentence of the third paragraph of subsection (a), added the fourth and

fifth paragraphs of subsection (a), and, in the first sentence of the last paragraph of subsection (a), deleted "physician, or hearing aid dealer or audiologist" following "category." The amendment added the final sentence in subsection (b), deleted "and apprentice licenses" following "licenses" in subdivision (c)(5), deleted "an apprentice license and" following "hold" and inserted "for registered apprentices and" in subdivision (c)(12), substituted a semi-colon for a period at the end of subdivision (c)(12), added subdivision (c)(13) and, in the last paragraph of subsection (d), inserted "and apprentices" following "licensees" in both places it appears in the first sentence.

CASE NOTES

Filing of Falsified Equipment Calibration Document as Willful Deceit. — See *In re* Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

§ 93D-4. Board may enjoin illegal practices.

The Board may, if it finds that any person is violating any of the provisions of this Chapter, apply to superior court for a temporary or permanent restraining order or injunction to restrain such persons from continuing such illegal practices. If upon application, it appears to the court that such person has violated or is violating the provisions of this Chapter, the court shall issue an order restraining the sale or fitting of hearing aids or other conduct in violation of this Chapter. All such actions by the Board for injunctive relief shall be governed by the Rules of Civil Procedure and Article 37, Chapter 1 of the General Statutes; provided, that injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of this Chapter. Actions under this section shall be commenced in the judicial district in which the respondent resides or has his principal place of business. (1969, c. 999; 1981, c. 601, s. 6.)

Effect of Amendments. — The 1981 amendment added the last sentence.

§ 93D-5. Requirements for registration; examinations; apprentice licenses.

(a) No person shall begin the fitting and selling of hearing aids in this State after the effective date of this Chapter until he is issued a license by the Board or is an apprentice working under the supervision of a licensee. Except as hereinafter provided, each applicant for a license shall pay a fee of one hundred dollars (\$100.00) and shall show to the satisfaction of the Board that he:

- (1) Is a person of good moral character,
- (2) Is 18 years of age or older,
- (3) Has an education equivalent to a four-year course in an accredited high school,
- (4) Is free of contagious or infectious disease.

(c) No license shall be issued to any person until he has served as an apprentice as set forth in G.S. 93D-9 for a period of at least one year; provided, that this subsection shall not apply to those persons qualified under G.S. 93D-6 nor to those persons holding masters degrees in Audiology who have undergone 250 hours of supervised activity fitting and selling hearing aids under the direct supervision of a licensed hearing aid dealer approved by the Board, or have met the licensure requirements under Article 22 of Chapter 90 of the General Statutes and have worked full time for one year fitting and selling hearing aids in the office of and under the direct supervision of an otolaryngologist and have participated in 250 hours of Board-supervised, continuing professional education in fitting hearing aids. (1969, c. 999; 1975, c. 550, s. 2; 1981, c. 601, ss. 7, 8; c. 990, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, in the first sentence of the introductory paragraph of subsection (a),

deleted "or apprentice license" following "license" and added the language following "Board" and, in subdivision (a)(2), substituted "18" for "21" and deleted "provided that, a person who has reached the age of 19 years or more may be awarded an apprentice license" at the

end of the subdivision. In subsection (c), the amendment substituted "served as" for "first held," deleted "license" following "apprentice" and added the language following "93D-6" at the end of the sentence.

The second 1981 amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the second sentence of the introductory paragraph of subsection (a).

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Article [Chapter] are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, except that he shall pay a fee of one hundred dollars (\$100.00) to the Board upon application. Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, c. 990, s. 2.)

Effect of Amendments. — The 1981 amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the second sentence.

§ 93D-8. Examination of applicants; issue of license certificate.

(a) Every applicant for a license who is notified by the Board that he has fulfilled the requirements of G.S. 93D-5(a), except those making application pursuant to G.S. 93D-6, shall appear at a time, place and before such persons as the Board may designate, to be examined by written and practical tests in order to demonstrate that he is qualified for the fitting and selling of hearing aids. The Board shall give one examination of the type prescribed herein each year at a duly prescribed time and place, which shall be publicized for at least 90 days in advance. Additional examinations may be given at the discretion of the Board. The examination provided in this section shall not include questions requiring a medical or surgical education but shall consist of:

- (1) Tests of knowledge in the following areas as they pertain to the fitting of hearing aids:
 - a. The basic physics of sound,
 - b. The human hearing mechanism, including the science of hearing and the cause and rehabilitation of abnormal hearing and hearing disorders, and
 - c. The structure and function of hearing aids.
- (2) Tests of proficiency in the following techniques as they pertain to the fitting of hearing aids:
 - a. Pure tone audiometry, including air conduction testing and bone conduction testing,
 - b. Live voice and recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing,
 - c. Effective masking,
 - d. Recording and evaluation of audiograms and speech audiometry to determine hearing aid candidacy,
 - e. Selection and adaption of hearing aids and testing of hearing aids,

- f. Taking earmold impressions, and
- g. Such other skills as may be required for the fitting of hearing aids in the opinion of the Board.

(1969, c. 999; 1981, c. 601, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in the first sentence of the introductory

paragraph of subsection (a), inserted a comma after "93D-5(a)", substituted "except" for "excepting" and deleted "and 93D-7" following "93D-6."

§ 93D-9. Registration of apprentices.

(a) Any person age 17 or older may apply to the Board for registration as an apprentice. Each such applicant must be sponsored by a hearing aid dealer and fitter licensed by the Board.

(b) Upon receiving an application accompanied by a fee of fifty-five dollars (\$55.00), the Board may register the applicant as an apprentice, which shall entitle the applicant to fit and sell hearing aids under the supervision of a holder of a regular license.

(c) No apprentice shall be registered by the Board under this section unless the applicant shows to the satisfaction of the Board that he is or will be supervised and trained by a hearing aid fitter and seller who holds a license.

(d) If a person 18 years of age or older who is registered as an apprentice under this section does not take the next succeeding examination given after a minimum of one full year of apprenticeship, his registration shall not be renewed, except for good cause shown to the satisfaction of the Board.

(e) If a person who is registered as an apprentice takes and fails to pass the next succeeding examination given after one full year of apprenticeship, the Board may renew the apprenticeship license for a period of time to end 30 days after the results of the examination given next after the date of renewal of said registration. The fee for renewal of apprenticeship registration shall be one hundred dollars (\$100.00).

(f) The Board shall adopt rules and regulations implementing initial and renewal registration of apprentices. (1969, c. 999; 1973, c. 1345, s. 4; 1981, c. 601, ss. 10-15; c. 990, s. 3.)

Effect of Amendments. — The first 1981 amendment rewrote subsections (a) and (f) and, in subsection (b), deleted "as provided under G.S. 93D-5(a)" following "application," substituted "fifty-five dollars (\$55.00)" for "five dollars (\$5.00)" and substituted "register the applicant as an apprentice" for "issue an apprenticeship license." The amendment substituted "apprentice shall be registered" for "apprenticeship license shall be issued" in subsection (c) and, in subsection (d), substituted "18" for "21", substituted "is registered as an apprentice" for "holds an apprenticeship license issued" and substituted "registration" for

"apprenticeship license." In subsection (e), the amendment substituted "is registered as an apprentice" for "holds an apprenticeship license" and "registration" for "apprenticeship license" in the first sentence and, in the second sentence, substituted "renewal of apprenticeship registration" for "apprenticeship license renewal" and "fifty dollars (\$50.00)" for "twenty-five dollars (\$25.00)."

The second amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" at the end of the second sentence of subsection (e).

§ 93D-10. Registration and notice.

The Board shall register each apprentice and each person to whom it grants a license. The secretary-treasurer of the Board shall keep a record of the place of business of all licensees and apprentices. Any notice required to be given by the Board to a person holding a license or apprenticeship registration may be given by mailing to him at the last address received by the Board from him. (1969, c. 999; 1981, c. 601, s. 16.)

Effect of Amendments. — The 1981 amendment, in the first sentence, inserted "each apprentice and" and deleted "or apprentice license" at the end of the sentence, in the second

sentence substituted "apprentices" for "apprentice licensees" and, in the third sentence, substituted "apprenticeship registration" for "apprentice license."

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Every licensed person who engages in the fitting and selling of hearing aids shall pay to the Board an annual license renewal fee of one hundred dollars (\$100.00). Such payment shall be made prior to the first day of April in each year. In case of default in payment the license shall expire 30 days after notice by the secretary-treasurer to the last known address of the licensee by registered mail. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of ten dollars (\$10.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of the late penalty of ten dollars (\$10.00) and renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee. (1969, c. 999; 1975, c. 550, s. 3; 1979, c. 848; 1981, c. 601, s. 17; c. 990, s. 4.)

Effect of Amendments. — The first 1981 amendment, in the first sentence, inserted "licensed" preceding "person."

The second 1981 amendment substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" at the end of the first sentence.

§ 93D-12. License to be displayed at office.

Every person to whom a license or apprenticeship registration is granted shall display the same in a conspicuous part of his office wherein the fitting and selling of hearing aids is conducted, or shall have a copy of such license or apprenticeship registration on his person and exhibit the same upon request when fitting or selling hearing aids outside of his office. (1969, c. 999; 1981, c. 601, s. 18.)

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration"

for "apprentice license" in both places in which those words appear.

§ 93D-13. Discipline, suspension, revocation of licenses.

(a) The Board may in its discretion administer the punishment of private reprimand, suspension of license for a fixed period or revocation of license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:

- (1) Habitual drunkenness
- (2) Gross incompetence
- (3) Knowingly fitting and selling hearing aids while suffering with a contagious or infectious disease
- (4) Commission of a criminal offense indicating professional unfitness
- (5) The use of a false name or alias in his business
- (6) Conduct involving willful deceit
- (7) Conduct involving fraud or any other business conduct involving moral turpitude
- (8) Advertising of a character or nature tending to deceive or mislead the public
- (9) Advertising declared to be unethical by the Board or prohibited by the code of ethics established by the Board
- (10) Permitting another person to use his license,
- (10a) Failure by a licensee to properly supervise an apprentice under his supervision, and
- (11) For violating any of the provisions of this Chapter.

(b) Board action in revoking or suspending a license shall be in accordance with the provisions of Chapter 150A of the General Statutes. Any person whose license has been suspended for any of the grounds or reasons herein set forth, may, after the expiration of 90 days but within two years, apply to the Board to have the same reissued; upon a showing satisfactory to the Board that such reissuance will not endanger the public health and welfare, the Board may reissue a license to such person for a fee of one hundred dollars (\$100.00) plus five dollars (\$5.00) for a certificate of license. If application is made subsequent to two years from date of suspension, reissuance shall be in accordance with the provisions of G.S. 93D-8. (1969, c. 999; 1973, c. 1331, s. 3; 1981, c. 601, s. 19; c. 990, s. 5.)

Effect of Amendments. — The first 1981 amendment, in subsection (a), deleted the words "or apprentice license" following "license" both places it appears in the introductory clause, deleted "or apprentice license, and" at the end of subdivision (10) and added subdivision (10a).

The second 1981 amendment substituted

"one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" near the end of the second sentence of subsection (b).

Legal Periodicals. — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Filing of Falsified Equipment Calibration Document as Willful Deceit. — See In re

Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars (\$1,000) nor less than

five hundred dollars (\$500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1969, c. 999; 1981, c. 601, s. 20.)

Effect of Amendments. — The 1981 amendment substituted "apprenticeship registration" for "apprentice license."

Chapter 95.

Department of Labor and Labor Regulations.

Article 1.

Department of Labor.

Sec.

95-2. Election of Commissioner; term; salary; vacancy.

Article 2A.

Wage and Hour Act.

95-25.2. Definitions.
 95-25.3. Minimum wage.
 95-25.5. Youth employment.
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 95-25.8. Withholding of wages.
 95-25.9. Certain claims not to be deducted immediately.
 95-25.10. Combined amounts of certain deductions and recoupments limited.
 95-25.11. Employers' remedies preserved.
 95-25.12. Vacation pay.
 95-25.13. Notification, posting, and records.
 95-25.14. Exemptions.
 95-25.20. Complainants protected.
 95-25.23. Violation of youth employment; civil penalty.

Article 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

95-54 to 95-69.2. [Repealed.]

Article 7A.

Uniform Boiler and Pressure Vessel Act.

Sec.

95-69.10. Application of Article; exemptions.
 95-69.12. Office of Director of Boilers and Pressure Vessels Division created; powers and duties.
 95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

Article 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

95-98.1. Strikes by public employees prohibited.
 95-98.2. Strike defined.

Article 14.

Inspection Service Fees.

95-105. Elevator, escalator, dumbwaiter, and special equipment inspection fees.
 95-106. Amusement, aerial tramway, and inclined railroad inspection fees.

Article 16.

Occupational Safety and Health Act of North Carolina.

95-134. Advisory council.
 95-148. Safety and health programs of State agencies and local governments.

ARTICLE 1.

Department of Labor.

§ 95-2. Election of Commissioner; term; salary; vacancy.

The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and the salary of the Commissioner of Labor shall be set by the General Assembly in the Budget Appropriation Act. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20; 1977, c. 802, s. 42.11; 1983, c. 761, s. 207.)

Editor's Note. — Session Laws 1983, c. 761, s. 259, contains a severability clause.

Effect of Amendments. — The 1983 amend-

ment, effective July 1, 1983, deleted "the same as for superior court judges as" preceding "set by" in the second sentence.

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

- (11) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. For the purposes of G.S. 95-25.2, G.S. 95-25.3, G.S. 95-25.14, and G.S. 95-25.20, it also means the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government. The Government of the United States and any agency of the United States (including the United States Postal Service and Postal Rate Commission) are not included as persons for any purpose under this Article.
- (13) "Seasonal religious or nonprofit educational conference center or a seasonal amusement or recreational establishment" means an establishment which does not operate for more than seven months in any calendar year, or during the preceding calendar year had average receipts for any six months of such year of not more than thirty-three and one-third percent ($33\frac{1}{3}\%$) of its average receipts for the other six months of that year.
- (18) "Enterprise" means the related activities performed either through unified operations or common control by any person or persons for a common business purpose and includes all such activities whether performed in one or more establishments or by one or more corporate units but shall not include the related activities performed for such enterprise by an independent contractor or franchisee. (1959, c. 475; 1961, c. 652; 1969, c. 34, s. 2; c. 218; 1971, c. 1231, s. 1; 1975, c. 413, s. 1; c. 605; 1977, c. 653; c. 672, s. 1; c. 826, s. 1; 1979, c. 839, s. 1; 1981, c. 663, ss. 10, 11; 1983, c. 708, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, in the second sentence of subdivision (11), inserted "G.S. 95-25.2" and "G.S. 95-25.14, and G.S. 95-25.20," substituted "any" for "a" preceding "city,"

deleted "other" preceding "municipality," and inserted "any State or local," added the third sentence of subdivision (11) and added subdivision (18).

The 1983 amendment, effective July 8, 1983, substituted "Seasonal religious or nonprofit education conference center" for "Seasonal religious assembly" in subdivision (13).

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least two dollars and seventy-five cents (\$2.75) per hour effective July 1, 1979, two dollars and ninety cents (\$2.90) per hour effective July 1, 1980, three dollars and ten cents (\$3.10) per hour effective January 1, 1982 and three dollars and thirty-five cents (\$3.35) per hour effective January 1, 1983 except as authorized below.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be ninety percent (90%) of the rate in effect under subsection (a) above, rounded to the lowest nickel.

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee employed by an establishment which is a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1; 1981, c. 493, s. 1; c. 663, s. 13; 1983, c. 708, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, effective January 1, 1982, in subsection (a), deleted "and" following "1979" and inserted the language beginning "three dollars" and ending "January 1, 1983."

The second 1981 amendment, effective October 1, 1981, in subsection (b), substituted the language following "shall be" for "two

dollars and forty-five cents (\$2.45) per hour, except that the commissioner may vary the amount after publishing notice, holding a public hearing, and following the other requirements of Chapter 150A (Administrative Procedure Act)."

The 1983 amendment, effective July 8, 1983, deleted "a seasonal religious assembly" following "by an establishment which" in subsection (c).

§ 95-25.5. Youth employment.

(a) No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The Commissioner of Labor shall prescribe regulations for youths and employers concerning the issuance, maintenance and revocation of certificates. Certificates will be issued by county directors of social services, subject to review by the Department of Labor; provided, the Commissioner may by regulation require that the Department of Labor issue certificates for occupations with unusual or unique characteristics.

(b) No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor shall find and by order declare to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths.

(c) No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Fair Labor Standards Act; provided, such youths may be employed by employers:

- (1) No more than three hours on a day when school is in session for the youth, except that the youth may work up to six hours on the last day of the school week;

- (2) No more than eight hours on a day when school is not in session for the youth;
- (3) Only between 7 A.M. and 7 P.M., except to 9 P.M. when there is no school for the youth the next day; and
- (4) No more hours per week than the following:

Days school in session for the youth	Weekly hours
5	18
4	26
3	34
2 or less	40

(d) No youth 13 years of age or less may be employed by an employer, except youths 12 and 13 years of age may be employed outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any youth under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) For any youth 13 years of age or older, the Commissioner may waive any provision of this section and authorize the issuance of an employment certificate when:

- (1) He receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and
- (2) He determines that the health or safety of the youth would not be adversely affected; and
- (3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

(g) Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions of this section except the certificate requirements of subsection (a).

(h) Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties and special effects are exempt from all provisions of this section except the certificate requirements of subsection (a). Positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all provisions of this section.

(i) Youths under 16 years of age employed by their parents are exempt from all provisions of this section, except the certificate requirements of subsection (a), the prohibition from hazardous or detrimental occupations of subsection (b), and the prohibitions of subsection (j).

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of alcoholic beverages, including any mixed beverages, shall employ a youth:

- (1) Under 16 years of age on the premises for any purpose;
- (2) Under 18 years of age to prepare, serve, dispense or sell any alcoholic beverages, including mixed beverages.

(k) Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all

provisions of this section, except the certificate requirements of subsection (a), the prohibition from occupations found and declared to be detrimental by the Commissioner of Labor pursuant to subsection (b), and the prohibitions of subsection (j). In addition, employment certificates will not be issued if such person's employment will be in violation of the applicable child labor provisions of the Fair Labor Standards Act. Such employers may also be assessed civil penalties pursuant to G.S. 95-25.23 for each violation of the provisions of this section or any regulation issued hereunder from which there is no exemption. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66.)

Effect of Amendments. —

The 1981 amendment, effective July 1, 1981, rewrote subsections (a) and (b), substituted the present introductory clause of subsection (c) for one which read "An employer may employ minors 14 and 15 years old," substituted "youth" for "minor" wherever it appears in subdivisions (c)(1) through (c)(4) and, in subsection (d), substituted the language beginning "No youth" and ending "employed" for "An employer may employ minors 12 and 13 years of age" in the first sentence and substituted "youth" for "person" in the second sentence. The amendment substituted "youth" for "minor" in the first sentence of subsection (e) and, in subsection (f), substituted "For any youth 13 years of age or older, the Commissioner may waive" for "The Commissioner may waive for any minor over 12 years of age" in the introductory clause, inserted "a letter from the North Carolina Alcohol Beverage Control Commis-

sion" and substituted "and how the best interest of the youth is served by allowing a waiver" for "when the best interests of a minor 12 years of age or older are served by allowing him to work" in subdivision (1) and substituted "youth" for "minor" in subdivision (2). Subsections (g) through (k) were added by the amendment.

Pursuant to Session Laws 1981, c. 412, ss. 3, 4, as amended by Session Laws 1981, c. 747, s. 66, "Chapter 18B" has been substituted for "Chapter 18A" and "alcoholic beverages" has been substituted for "intoxicating liquors" in subsection (j) as enacted by Session Laws 1981, c. 489.

Legal Periodicals. — For article, "A History of Liquor-By-The Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

Cited in *Golden v. Register*, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture. (1975, c. 413, s. 4; 1979, c. 839, s. 1; 1981, c. 663, s. 1.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added the second through fourth sentences.

§ 95-25.8. Withholding of wages.

An employer may withhold or divert any portion of an employee's wages when:

- (2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made indicating the reason for the deduction. Two types of authorization are permitted:
 - a. When the amount or rate of the proposed deduction is known and agreed upon in advance, the authorization shall specify the dollar amount or percentage of wages which shall be deducted from one or more paychecks, provided that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization;
 - b. When the amount of the proposed deduction is not known and agreed upon in advance, the authorization need not specify a dollar amount which can be deducted from one or more paychecks, provided that the employee receives advance notice of the specific amount of any proposed deduction and is given a reasonable opportunity to withdraw the authorization before the deduction is made. (1975, c. 413, s. 6; 1979, c. 839, s. 1; 1981, c. 663, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added the lan-

guage beginning "indicating" at the end of the first sentence of subdivision (2), added the second sentence of subdivision (2) and added subdivisions (2)a and (2)b.

§ 95-25.9. Certain claims not to be deducted immediately.

Cash shortages, inventory shortages, or loss or damage to an employer's property may not be deducted from an employee's wages unless the employee receives notice of the amount to be deducted at least seven days prior to the payday on which the deduction is to be made, except when a separation occurs the seven-day notice is not required. (1979, c. 839, s. 1; 1981, c. 663, s. 3.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, deleted "Except as otherwise provided in this Article" at the beginning of the sentence, inserted "or loss" and

substituted the language following "wages" for "due on the payday immediately following the occurrence of the shortage or damage."

§ 95-25.10. Combined amounts of certain deductions and recoupments limited.

Cash shortages, inventory shortages, loss or damage to an employer's property, and deposits by the employee for the use of the employer's property may be deducted by an employer from an employee's paycheck in accordance with the requirements of G.S. 95-25.8 and G.S. 95-25.9 or may be recouped by methods other than payroll deductions, provided that the combined amount of such deductions or recoupments shall not reduce wages for the pay period during which the deduction or recoupment occurs below:

- (1) Eighty-five percent (85%) of the minimum and overtime wages required under this Article when such wages for the employee are determined under this Article, or
- (2) The minimum and overtime wages required under the Fair Labor Standards Act when such wages for the employee are determined under that Act, or

- (3) An amount equivalent to the amount of minimum and overtime wages which would be required under this Article when the wages for an employee are determined neither by this Article nor by the Fair Labor Standards Act.

Nothing in this section shall prohibit the voluntary repayment of any amount owed by an employee to an employer. (1979, c. 839, s. 1; 1981, c. 663, s. 4.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, rewrote this section, which formerly limited the combined

amounts of certain deductions to 15% of gross pay.

§ 95-25.11. Employers' remedies preserved.

(a) The provisions of G.S. 95-25.8, G.S. 95-25.9, and G.S. 95-25.10 do not apply if criminal process has issued against the employee, if the employee has been indicted, or if the employee has been arrested pursuant to Articles 17, 20, and 32 of Chapter 15A of the General Statutes for a charge incident to a cash shortage, inventory shortage, or damage to an employer's property.

If the employee is not found guilty, then the amount deducted shall be reimbursed to the employee by the employer.

(b) Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee. (1979, c. 839, s. 1; 1981, c. 663, s. 5.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, substituted subsection (a) for a former first paragraph which concerned applicability of a fifteen

percent limitation on amounts of certain deductions, designated the second paragraph as subsection (b), and substituted "a civil" for "an" in subsection (b).

§ 95-25.12. Vacation pay.

No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture. (1979, c. 839, s. 1; 1981, c. 663, s. 6.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, in the first sentence, substituted "No" for "An", deleted "not" preceding "required" and substituted "vacation" for "vacations" and, in the second sentence, inserted "However", substituted "an" for "the" following "if", substituted "vacation for

for "vacations to", substituted "give all vacation time off" for "pay all vacation pay", substituted "in accordance with the" for "as required by" and deleted "past" preceding "practice." The amendment added the third and fourth sentences and deleted former second and third paragraphs which concerned accrual policies.

§ 95-25.13. Notification, posting, and records.

Every employer shall:

- (3) Notify his employees, in writing or through a posted notice maintained in a place accessible to his employees, of any changes in the arrangements specified in (2) above prior to the time of such changes except that wages and benefits may be retroactively increased without the prior notice required by this subsection; and

(1975, c. 413, s. 7; 1979, c. 839, s. 1; 1981, c. 663, s. 12.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, substituted "(2)" for "(b)" in subdivision (3).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), G.S. 95-25.5 (Youth Employment), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions do not apply to:

- (1) Any person or establishment required to comply with or subject to the regulation of wages, overtime, child labor and related record keeping under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
- (2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;
- (3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;
- (4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;
- (5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;
- (6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;
- (7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
- (8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions do not apply to:

- (1) Any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center.
- (2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;
- (3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;
- (4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;
- (5) Any person employed in an enterprise that does not have three or more employees in any workweek;
- (6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21.

(c) The provisions of G.S. 95-25.4 (Overtime) and G.S. 95-25.15(b) (Record Keeping) as it relates to this exemption do not apply to:

- (1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;

- (2) Taxicab drivers;
 - (3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;
 - (4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;
 - (5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;
 - (6) Live-in child care workers or other live-in employees in homes for dependent children;
 - (7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.
- (d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:
- (1) The minimum wage provisions of G.S. 95-25.3;
 - (2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;
 - (3) The exemptions of subsections (a) and (b) of this section;
 - (4) The complainant protection provisions of G.S. 95-25.20.
- (e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2; c. 606, s. 2; c. 663, s. 7; 1983, c. 708, s. 2.)

Effect of Amendments. — The first 1981 amendment, effective Jan. 1, 1982, substituted "three" for "four" in subdivision (a)(6) as it stood before the third 1981 amendment, which was similar to subdivision (b) (5) in the section as set out above.

The second 1981 amendment added to subsection (b) as it stood before the third 1981 amendment a new subdivision (5), identical to subdivision (6) in subsection (b) as set out above.

The third 1981 amendment, effective Oct. 1, 1981, rewrote the section to read as set out above.

The 1983 amendment, effective July 8, 1983, added "or of a seasonal religious or nonprofit educational conference center" to subdivision (1) of subsection (b).

Stated in *Golden v. Register*, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

§ 95-25.20. Complainants protected.

(a) No employer shall discharge or in any manner discriminate against any employee because the employee files a complaint or participates in any investigation or proceeding under this Article. Any employee who believes that he has been discharged or otherwise discriminated against in violation of this section may, within 60 days after such violation occurs, file a complaint with the Commissioner alleging such discrimination. If the Commissioner determines that the provisions of this section have been violated, he shall bring an action against the employer in the superior court division of the General Court of Justice in the county wherein the discharge or discrimination occurred. In any such action, the superior court shall have jurisdiction, for cause shown, to restrain violations of this section and order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay.

(b) Files and other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are pending. (1979, c. 839, s. 1; 1981, c. 663, s. 8.)

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, designated the former section as subsection (a), substituted

"60" for "30" in the second sentence thereof and added subsection (b).

§ 95-25.23. Violation of youth employment; civil penalty.

(d) Assessment of penalties under this section shall be subject to a two-year statute of limitations commencing at the time of the occurrence of the violation. (1979, c. 839, s. 1; 1981, c. 663, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, effective October 1, 1981, added subsection (d).

CASE NOTES

Cited in *Golden v. Register*, 50 N.C. App. 650, 274 S.E.2d 892 (1981).

ARTICLE 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.8. Enforcement of arbitration agreement and award.

CASE NOTES

Stated in *Tucker v. General Tel. Co.*, 50 N.C. App. 112, 272 S.E.2d 911 (1980).

ARTICLE 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

§§ 95-54 to 95-69.2: Repealed by Session Laws 1981 (Regular Session, 1982), c. 1187, s. 1.

ARTICLE 7A.

*Uniform Boiler and Pressure Vessel Act.***§ 95-69.10. Application of Article; exemptions.**

- (b) This Article shall not apply to:
- (1) Boilers and pressure vessels owned and/or operated by the federal government;
 - (2) Pressure vessels used for transportation or storage of compressed gases when constructed in compliance with the specifications of the U.S. Department of Transportation and when charged with gas marked, maintained, and periodically requalified for use, as required by appropriate regulations of the U.S. Department of Transportation;
 - (3) To portable boilers and pressure vessels used for agricultural purposes only or for pumping or drilling in an open field for water, gas or coal, gold, talc or other minerals and metals;
 - (4) Boilers and pressure vessels which are located in private residences or in apartment houses of less than six families;
 - (5) Pressure vessels used for transportation or storage of liquified petroleum gas;
 - (6) Air tanks located on vehicles licensed under the rules and regulations of other state authorities operating under rules and regulations substantially similar to those of this State and used for carrying passengers or freight within interstate commerce;
 - (7) Air tanks installed on right-of-way of railroads and used directly in the operation of trains;
 - (8) Pressure vessels that do not exceed five cubic feet in volume and 250 PSIG pressure; or one and one-half cubic feet in volume and 600 PSIG pressure; or an inside diameter of six inches with no limitations on pressure;
 - (9) Pressure vessels operating at a working pressure not exceeding 15 PSIG pressure;
 - (10) Pressure vessels with a nominal water capacity of 120 gallons or less and containing water under pressure at ambient temperature, including those containing air, the compression of which serves as a cushion;
 - (11) Boilers and pressure vessels on railroad steam locomotives that are subject to federal safety regulations;
 - (12) Hydropneumatic pressure tanks installed and operated by community water systems before October 1, 1983 when the tanks are located more than 50 feet from any occupied building. Hydropneumatic pressure tanks installed and operated by community water systems on or after October 1, 1983 when the tanks are located more than 75 feet from any occupied building. To qualify for these exemptions, the owner or operator of the community water system must certify to the Boiler Division of the North Carolina Department of Labor that the tanks are so located.
- (d) The construction requirements established by the Department of Labor shall not apply to pressure vessels installed in this State prior to December 31, 1981, that:

- (1) Are of one-piece, forged construction and have no weldments;
- (2) Are constructed before January 1, 1981, and operating or could be operated, under the laws of any state that has adopted one or more sections of the ASME Code;
- (3) Are transferred into this State without a change of ownership; and
- (4) Are determined by the Director to be constructed under standards substantially equivalent to those established by the department at the time of transfer;

provided that they are equipped with ASME Code and National Board certified safety relief valves. (1975, c. 895, s. 3; 1979, c. 920, ss. 1, 2; 1981, c. 591; 1983, c. 654.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment added subsection (d).

The 1983 amendment, effective June 30, 1983, added subdivision (b)(12).

§ 95-69.12. Office of Director of Boilers and Pressure Vessels Division created; powers and duties.

There is hereby created the office of Director of the Boiler and Pressure Vessel Division within the North Carolina Department of Labor. The person holding this office shall assist the Commissioner in carrying out the provisions of this Article in accordance with the provisions of Chapter 126 of the General Statutes. The Director is charged with the responsibility for the administration of this Article on a day-to-day basis.

The Director shall be primarily responsible for the inspection of boilers and pressure vessels subject to this Article and for the issuance of inspection certificates for those boilers and pressure vessels found suitable. He shall also be responsible for the collection of fees for the inspection of boilers and pressure vessels and transmitting the same to the State Treasurer, where they shall be held in a special account to cover the operating expenses of the Division. (1975, c. 895, s. 5; 1981 (Reg. Sess., 1982), c. 1187, ss. 2, 3.)

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "of the Division" for "associated with the direct field inspections of this Article" in the present last sentence of the second paragraph, and deleted

the former last sentence thereof, which read: "All administrative functions pursuant to this Article shall be paid out of the State general fund."

§ 95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

(a) There is hereby created the North Carolina Board of Boiler and Pressure Vessels Rules consisting of nine members appointed by the Commissioner, of which three shall be appointed for a term of one year, three for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. At the expiration of their respective terms of office, their successors shall be appointed for terms of five years each. Of these nine appointed members, one shall be a representative of the owners and users of

steam boilers within this State, one a representative of boiler manufacturers within this State, one a representative of boilermakers within this State who has had not less than five years' practical experience as a boilermaker, one shall be a representative of the owners or users of pressure vessels within the State, one shall be a representative of the pressure vessel manufacturers within the State, one a representative of a boiler inspection and insurance company authorized to insure boilers and pressure vessels within the State, one a representative of the operating steam engineers in this State, one a contractor holding a Group I North Carolina Heating License, and one a mechanical engineer on the faculty of a recognized engineering college or a licensed professional engineer having boiler and pressure vessel experience. The Commissioner of Labor shall serve as chairman.

(c) The members of the Board shall serve without salary but shall be paid a subsistence and travel allowance as established in accordance with Chapter 138 of the General Statutes. (1975, c. 895, s. 6; 1977, c. 788; 1981 (Reg. Sess., 1982), c. 1187, s. 4; 1983, c. 717, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1981 (Reg. Sess., 1982) amendment substituted "serve as

chairman" for "annually designate one member to serve as chairman" in the last sentence of subsection (a).

The 1983 amendment, effective July 11, 1983, deleted "by the Advisory Budget Commission" preceding "in accordance with Chapter 138 of the General Statutes" at the end of subsection (c).

ARTICLE 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

Legal Periodicals. — For article, "Right-To-Work Laws in the Southern States," see 59 N.C.L. Rev. 29 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Quoted in National Right to Work Legal Defense & Educ. Foundation, Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979).

§ 95-81. Nonmembership as condition of employment prohibited.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-83. Recovery of damages by persons denied employment.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-97. Employees of units of government prohibited from becoming members of trade unions or labor unions.

Legal Periodicals. — For article, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Legal Periodicals. — For article, "Public Employee Labor Relations in the Southeast — An Historical Perspective," see 59 N.C.L. Rev. 71 (1980).

For article, "The Southern Public Employee Unions' Constitutional Card: Utilization of the

Equal Protection Clause," see 59 N.C.L. Rev. 85 (1980).

For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

CASE NOTES

Right of Association to Express Wage Views before City Council. — Although this section forbids North Carolina municipalities from entering into contracts or agreements with labor unions or associations, that prohibition does not extend to a union's advocacy of a particular point of view. Thus, North Carolina's policy prohibiting governmental bodies from

negotiating with labor unions was not implicated and therefore could not serve as a compelling state interest allowing restriction of the Hickory Fire Fighters Association's right to advocate its position on firefighters' wages in front of the city council. *Hickory Fire Fighters Ass'n, Local 2653 v. City of Hickory*, 656 F.2d 917 (4th Cir. 1981).

§ 95-98.1. Strikes by public employees prohibited.

Strikes by public employees are hereby declared illegal and against the public policy of this State. No person holding a position either full- or part-time by appointment or employment with the State of North Carolina or in any county, city, town or other political subdivision of the State of North Carolina, or in any agency of any of them, shall willfully participate in a strike by public employees. (1981, c. 958, s. 1.)

Editor's Note. — Session Laws 1981, c. 958, s. 2, contains a severability clause.

§ 95-98.2. Strike defined.

The word "strike" as used herein shall mean a cessation or deliberate slowing down of work by a combination of persons as a means of enforcing compliance with a demand upon the employer, but shall not include protected activity under Article 16 of this Chapter: Provided, however, that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of public employment so long as the same is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment. (1981, c. 958, s. 1.)

Editor's Note. — Session Laws 1981, c. 958, s. 2, contains a severability clause.

§ 95-99. Penalty for violation of Article.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

§ 95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

Legal Periodicals. — For comment on public employee bargaining in North Carolina, see 59 N.C.L. Rev. 214 (1980).

ARTICLE 14.

Inspection Service Fees.

§ 95-105. Elevator, escalator, dumbwaiter, and special equipment inspection fees.

The Department of Labor shall assess and collect the following inspection service fees for the installation and alteration of elevators, escalators, dumbwaiters that are not installed or altered in restaurants, and special equipment based on the cost of installation or alteration:

Cost of Installation or Alteration		Unit Fee
\$0	- \$ 10,000	\$ 80
10,001	- 30,000	120
30,001	- 50,000	170
50,001	- 80,000	215
80,001	- 100,000	235
Over 100,000		285.

An additional fee of seventy-five dollars (\$75.00) shall be assessed for each follow-up inspection of a new installation required subsequent to the original inspection.

The Department of Labor shall assess and collect a fee of ten dollars (\$10.00) for the periodic inspection of special equipment and shall assess and collect the following fees for the periodic inspection of elevators, escalators, and dumbwaiters:

Number of Building Floors	
1-5 Floors	\$13
6-10 Floors	20
11-15 Floors	35
16-Floors and over	45

(1975, c. 777, s. 1; 1977, c. 983; 1983, c. 713, s. 52.)

Effect of Amendments. — The 1983 amendment, effective July 8, 1983, rewrote this section.

§ 95-106. Amusement, aerial tramway, and inclined railroad inspection fees.

The Department of Labor shall assess and collect the following inspection service fees for annual inspections for each location within the State of amusement devices, aerial passenger tramways, and inclined railroads:

Type Inspection	Unit Fee
Amusement Devices	\$ 12
Gondolas, Chairlifts, and Inclined Railroads	137
J- or T-Bars	62
Rope Tows	31

(1975, c. 777, s. 2; 1983, c. 713, s. 53.)

Effect of Amendments. — The 1983 amendment, effective July 8, 1983, substituted "the Department of Labor shall assess" for "the North Carolina Department of Labor is hereby authorized to assess" at the beginning of the introductory paragraph and increased the fee

for inspection of amusement devices from \$10.00 to \$12.00, for inspection of gondolas, chairlifts, and inclined railroads from \$125 to \$137, for inspection of J- or T-bars from \$56.00 to \$62.00, and for inspection of rope tows from \$28.00 to \$31.00.

ARTICLE 15.
Passenger Tramway Safety.

Cross References. — As to review and evaluation of the programs and functions authorized under this Article, see § 143-34.26.
Repeal of Article. —

The provision of Session Laws 1977, c. 712, as amended, tentatively repealing this Article effective July 31, 1981, was itself repealed by Session Laws 1981, c. 932, s. 1.

§ 95-116. Declaration of policy.

Cross References. — As to actions relating to skier safety and skiing accidents, see §§ 99C-1 through 99C-5.

§ 95-120. Powers and duties of the Commissioner.

Cross References. — As to duties of ski operators and skiers, see § 99C-2.

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Quoted in *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-127. Definitions.

CASE NOTES

Serious Violation. — The evidence supported a determination by the Safety and Health Review Board that respondent was guilty of a serious and repeated Occupational Safety and Health Act violation in failing to slope to adequate angle of repose or provide adequate shoring for sewer line trench in hard or compact soil more than five feet in depth at job site on April 21, 1977, where it showed that the trench in question was eight feet deep and at least eight feet in length; there was no

sloping or shoring or wall support of any kind; and respondent had paid a fine for failing properly to shore, slope or otherwise protect the sides of a trench in 1974, although the 1974 violation was for work in soft or unstable soil rather than in hard or compact soil. *Brooks v. McWhirter Grading Co.*, 49 N.C. App. 352, 271 S.E.2d 568 (1980), rev'd on other grounds, 303 N.C. 573, 281 S.E.2d 24 (1981).

Quoted in *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-129. Rights and duties of employers.

CASE NOTES

Applied in *Prevette v. Clark Equip. Co.*, — N.C. App. —, 302 S.E.2d 639 (1983).

§ 95-130. Rights and duties of employees.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

CASE NOTES

OSHA Regulations Admissible to Establish Standard of Care. — Occupational Safety and Health Act regulations are some evidence of the custom in the construction industry and are admissible to establish the standard of care required of reasonable men in the same circumstances. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982).

But Violation of OSHA Rules Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation

causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982).

Quoted in *Prevette v. Clark Equip. Co.*, — N.C. App. —, 302 S.E.2d 639 (1983).

Cited in *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-134. Advisory Council.

(c) The Director shall furnish to the Advisory Council such secretarial, clerical and other services as he deems necessary to conduct the business of the Advisory Council. The members of the Advisory Council shall be compensated for reasonable expenses incurred, including necessary time spent in traveling to and from their place of residence within the State to the place of meeting, and mileage and subsistence as allowed to State officials. The members of the Advisory Council shall be compensated in accordance with Chapter 138 of the General Statutes.

(d) In addition to its other duties, the Advisory Council shall assist the Commissioner in formulating and setting standards under the provisions of this Article. For this purpose the Commissioner may appoint persons qualified by experience and affiliation to present the viewpoint of the employers involved, persons similarly qualified to present the viewpoint of the workers involved, and some persons to represent the health and safety agencies of the State. The Commissioner for this purpose may include representatives or professional organizations of technicians or professionals specializing in occupational safety or health. Such persons appointed for temporary purposes may be paid such per diem and expenses of attending meetings as provided in Chapter 138 of the General Statutes. (1973, c. 295, s. 9; 1977, c. 806; 1983, c. 717, ss. 17, 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1983 amendment, effective July 11, 1983, substituted "in accordance with Chapter 138 of General Stat-

utes" for "on a per diem basis which shall be fixed by the Governor and Advisory Budget Commission" in the last sentence of subsection (c), and in the last sentence of subsection (d) substituted "provided in Chapter 138 of the General Statutes" for "may be fixed by the Commissioner and Advisory Budget Commission."

§ 95-135. Safety and Health Review Board.

CASE NOTES

Board Complied with Authority. — In an appeal from a decision of a hearing examiner that respondent's violation of the Occupational Safety and Health Act was not repeated and serious and merited no penalty, the Safety and Health Review Board complied with its function and authority to adopt, modify or vacate the order of the hearing examiner where the board's order restated the findings of fact made by the hearing examiner almost verbatim, narrated some of the evidence, and

made additional findings, and where the decision portion of the order modified the order of the hearing examiner so as to conclude that the cited violation was repeated and serious and justified a penalty of \$2,500. *Brooks v. McWhirter Grading Co.*, 49 N.C. App. 352, 271 S.E.2d 568 (1980), rev'd on other grounds, 303 N.C. 573, 281 S.E.2d 24 (1981).

Quoted in *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-136. Inspections.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

§ 95-138. Civil penalties.

CASE NOTES

When Act Is Willful. — An act is willful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another or some duty assumed by contract or imposed by law. *Prevette v. Clark Equip. Co.*, — N.C. App. —, 302 S.E.2d 639 (1983).

What Constitutes "Repeated" Violation. — In order for a violation to be repeated, it must be against the same employer and it must also be substantially similar to prior violations. *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

A subsequent OSHA violation by the same employer substantially similar to a prior violation or violations is a "repeated" violation only if the employer should have known of the standard by virtue of the prior citation or citations. Factors which should be considered in determining whether the employer should have known of the standard are the extent to which the condition was obviously unsafe, the proximity in time to the prior citation, whether management or key employees had changed between citations, and the number of prior substantially similar violations. *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

Where two alleged OSHA violations are of different subsections of the same standard and involve the same hazard, the second violation can form the basis of the citation for a "repeated" violation. *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

Burden of Showing "Serious" Violation. — In order to establish a serious OSHA violation under this section, the Commissioner of Labor must show by substantial evidence that the violation created a possibility of an accident, a substantially probable result of which was death or serious physical injury. *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982).

§ 95-139. Criminal penalties.

CASE NOTES

Violation of OSHA Rule Not Negligence Per Se. — Since a willful violation of an Occupational Safety and Health Act rule constitutes a misdemeanor only if said violation causes the death of an employee, and for all other violations, the sanction is a possible civil penalty

assessed by the Commissioner, the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence per se. *Cowan v. Laughridge Constr. Co.*, 57 N.C. App. 321, 291 S.E.2d 287 (1982).

§ 95-141. Judicial review.

CASE NOTES

Stated in *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

§ 95-148. Safety and health programs of State agencies and local governments.

It shall be the responsibility of each administrative department, commission, board, division or other agency of the State and of counties, cities, towns and subdivisions of government to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards and regulations promulgated under this Article. The head of each agency shall:

- (1) Provide safe and healthful places and conditions of employment, consistent with the standards and regulations promulgated by this Article;
- (2) Acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;
- (3) Consult with and encourage employees to cooperate in achieving safe and healthful working conditions;
- (4) Keep adequate records of all occupational accidents and illnesses for proper evaluation and corrective action;
- (5) Consult with the Commissioner as to the adequacy as to form and content of records kept pursuant to this section;
- (6) Make an annual report to the Commissioner with respect to occupational accidents and injuries and the agency's program under this section.

The Commissioner shall transmit annually to the Governor and the General Assembly a report of the activities of the State agency and instrumentalities under this section. If the Commissioner has reason to believe that any local government program or program of any agency of the State is ineffective, he shall, after unsuccessfully seeking by negotiations to abate such failure, include this in his annual report to the Governor and the General Assembly, together with the reasons therefor, and may recommend legislation intended to correct such condition.

The Commissioner shall have access to the records and reports kept and filed by State agencies and instrumentalities pursuant to this section unless such records and reports are required to be kept secret in the interest of national

defense, in which case the Commissioner shall have access to such information as will not jeopardize national defense.

The Commissioner will not impose civil or criminal penalties against any State agency or political subdivision or violations described and covered by this Article.

Employees of any agency or department covered under this section are afforded the same rights and protections as granted employees in the private sector.

This section shall not apply to volunteer fire departments not a part of any municipality.

Any municipality with a population of 10,000 or less may exclude its fire department from the operation of this section by a resolution of the governing body of the municipality.

The North Carolina Fire Commission shall recommend regulations and standards for fire departments. (1973, c. 295, s. 23; 1983, c. 164.)

Effect of Amendments. — The 1983 amendment, effective April 12, 1983, added the last three paragraphs.

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.

96-3. Employment Security Commission.

96-4. Administration.

96-5. Employment Security Administration Fund.

Article 2.

Unemployment Insurance Division.

96-8. Definitions.

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96-9. Contributions.

96-10. Collection of contributions.

96-12. Benefits.

96-13. Benefit eligibility conditions.

96-14. Disqualification for benefits.

96-15. Claims for benefits.

96-16. Seasonal pursuits.

96-17. Protection of rights and benefits; deductions for child support obligations.

96-18. Penalties.

ARTICLE 1.

Employment Security Commission.

§ 96-1. Title.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For comment discussing unemployment compensation in light of *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

§ 96-2. Declaration of State public policy.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Applied in *Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982).

§ 96-3. Employment Security Commission.

(a) **Organization.** — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall serve at the pleasure of the Governor. Any member appointed to fill a

vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(c) Salaries. — The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the General Assembly in the Budget Appropriation Act; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354; 1983, c. 717, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1983, c. 717, s. 1, provides: "This act may be cited as the Separation of Powers Act of 1983."

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, in the sixth sentence of subsection (a), substituted "serve at the

pleasure of the Governor" for "be appointed for a term of four years from and after his appointment."

The 1983 amendment, effective July 11, 1983, substituted "fixed by the General Assembly in the Budget Appropriation Act" for "fixed by the Governor subject to the approval of the Advisory Budget Commission" in subsection (c).

§ 96-4. Administration.

(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by G.S. 96-8(4) and 96-8(5) and subdivisions thereunder. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. Hearings may be before the Commission or a Deputy Commissioner and shall be held in the central office of the Commission or at any other designated place within the State. They shall be open to the public and shall consist of a review of the evidence taken by a hearing officer designated by the Commission and a determination of the law applicable to that evidence. The Commission shall provide for the taking of evidence by a hearing officer who shall be a member of the legal staff of the Commission. Such hearing officer shall have the same power to issue subpoenas, administer oaths, conduct hearings and take evidence as is possessed by the Commission and such hearings shall be recorded, and he shall transmit all testimony and records of such hearings to the Commission for its determination. All such hearings conducted by such hearing officer shall be scheduled and held in any county in this State in which the employing unit or employer either resides, maintains a place of business, or conducts business; however, the Commission may require additional testimony at any hearings held by it at its office. From all decisions or determinations made by the Commission or a Deputy Commis-

sioner any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within 10 days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within 10 days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within 10 days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within 30 days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business, or, unless the appellant objects after being given reasonable opportunity to object, to a judge of the Superior Court of Wake County: Provided, however, the 30-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have 10 days' notice.

(s) Upon a finding of good cause, the Commission shall have the power in its sole discretion to forgive, in whole or in part, any overpayment arising under G.S. 96-18(g)(2). (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2; 1981, c. 160, s. 1; 1983, c. 625, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in the fourteenth sentence of subsection

(m), substituted "appellant" for "appellee" preceding "objects."

The 1983 amendment, effective Aug. 1, 1983, added subsection (s).

CASE NOTES

The Employment Security Law authorizes the Commission to establish its own methods of procedure and conduct of hearings. *Hester v. Knitwear*, — N.C. App. —, 301 S.E.2d 508 (1983).

Employer's Right to Appeal from Adverse Decision. — See *Cianfarra v. N.C. Dep't of Transp.*, 306 N.C. 737, 295 S.E.2d 457 (1982).

Conclusiveness of Findings of Fact on Review. —

Findings of fact by the Commission which are

supported by competent evidence in the record are conclusive on appeal. *Yelverton v. Kemp Furn. Indus., Inc.*, 51 N.C. App. 215, 275 S.E.2d 553 (1981).

Quoted in *Cianfarra v. N.C. Dep't of Transp.*, 56 N.C. App. 380, 289 S.E.2d 100 (1982).

Cited in *Intercraft Indus. Corp. v. Morrison*, 54 N.C. App. 225, 283 S.E.2d 555 (1981).

§ 96-5. Employment Security Administration Fund.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in the fourth sentence of subsection (c),

substituted "shall also" for "also shall" and substituted clauses (i) through (iii) for "incidental extensions, repairs, enlargements or improvements."

ARTICLE 2.

*Unemployment Insurance Division.***§ 96-8. Definitions.**

As used in this Chapter, unless the context clearly requires otherwise:

(5) "Employer" means:

- a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars (\$1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (l) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.
- b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S. 96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for

termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

- c. Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph a of this subdivision, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which the organization, trade, or business, or substantially all the assets were acquired.
- d. Any employing unit which, having become an employer under paragraphs a, b, or c, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or
- e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.
- f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.
- g. Any employing unit with its principal place of business located outside the State of North Carolina which engages in business within the State of North Carolina and which employing unit has in employment one or more individuals for some portion of a day in as many as 20 different calendar weeks in any period of 12 consecutive months or has had in employment and paid for service wages in any quarter in 12 consecutive calendar months in the amount of one thousand five hundred dollars (\$1,500) or more shall be deemed to be an employer subject to the other provisions of this Chapter.
- h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be

- an employer by reason of any other paragraph of this subdivision.
- i. Any employing unit which acquired a part of the organization, trade or business of another which if treated as a single unit which such part acquired would be an employer under paragraph a of this subdivision if such part acquired had constituted all of the organization, trade or business of the predecessor, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which such part of the organization, trade, or business was acquired.
 - j. Prior to January 1, 1978, any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars (\$1,500) or more.

For purposes of this Chapter, "institution of higher education" means an educational institution in this State which: (i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (ii) is legally authorized in this State to provide a program of education beyond high school; (iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for credit toward such a degree or a program of training to prepare students for gainful employment in a recognized occupation; (iv) is a public or other nonprofit institution; and (v) notwithstanding any of the foregoing provisions of this subdivision, is a university, college, community college, or technical institute in the State.

For purposes of this Chapter, "State hospital" means any institution licensed by the Department of Human Resources under Chapter 22 [Chapter 122] or Chapter 131 of the General Statutes.

- k. Notwithstanding any other provision of this Chapter, any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), corporations, any community chest, fund, or foundation which are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals and which is exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, provided such employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week).

- l. Repealed by Session Laws 1981, c. 160, s. 5.
- m. Repealed by Session Laws 1981, c. 160, s. 6.
- n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in the current calendar year or the preceding calendar year paid wages of twenty thousand dollars (\$20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.
- o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars (\$1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
- p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 37, Chapter 160 of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System.

q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5j).

(6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

1. The service is localized in this State; or
2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.

c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (1) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.

- e. Service shall be deemed to be localized within a state if:
 1. The service is performed entirely within such state; or
 2. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.
- f. The term "employment" shall include:
 1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
 2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (1), of this Chapter during the effective period of such election.
 3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.
 4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connection with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.
 5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:
 - (a) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry-cleaning services, for his principal;
 - (b) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for mer-

chandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph (b) or (e) of this subsection or the parallel provisions of another state's law), if:

(i) The employer's principal place of business in the United States is located in this State; or

(ii) The employer has no place of business in the United States, but

(I) The employer is an individual who is a resident of this State; or

(II) The employer is a corporation which is organized under the laws of this State; or

(III) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any other state; or

(iii) None of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this State.

(iv) An "American employer," for the purposes of this paragraph, means a person who is:

(I) An individual who is a resident of the United States; or

(II) A partnership if two thirds or more of the partners are residents of the United States; or

(III) A trust, if all of the trustees are residents of the United States; or

(IV) A corporation organized under the laws of the United States or of any state;

(V) For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

- g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars (\$20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year, each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.
- h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local

chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars (\$1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

i. On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; (c) as a member of the State National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.

k. The term "employment" shall not include:

1. Prior to January 1, 1978, services performed in the employ of this State, or of any political subdivision thereof, or any instrumentality of this State or its political subdivisions except from and after January 1, 1972, services performed for employers as defined in G.S. 96-8(5)j, and 96-11(c)(3), and except as otherwise provided in this Chapter.

2. Except with respect to service performed for an employer as defined in G.S. 96-8(5)j, service performed prior to January 1, 1978, in the employ of any other state or its political subdivisions, or of the United States Government, or of an instrumentality of any other state or states or their political subdivisions or of the United States and service performed in the employ of the United States Government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed by this Chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code of 1954, the payments required for such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in G.S. 96-10(e) with respect to contributions erroneously collected.

3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication

thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act of Congress, acquired rights to benefits under this Chapter.

4. Prior to January 1, 1978, service performed in agricultural labor as defined in G.S. 96-8(6)g.
5. Prior to January 1, 1978, domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell fish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).
7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.
9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
10. Except as provided in G.S. 96-8(6)f5(a), service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subdivision (l) of G.S. 96-4 during the effective period of such election.
11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code of 1954 (other than

an organization described in section 401(a) of said Internal Revenue Code of 1954) or under section 521 of the Internal Revenue Code of 1954, if the remuneration for such service is less than fifty dollars (\$50.00).

13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.
14. Service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.
15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971, by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1971, by an inmate of a custodial or penal institution.

16. Notwithstanding the provisions of G.S. 96-8(6)f3 and 96-8(6)k6, service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under the arrangement with the owner or operator of such boat pursuant to which:

- (A) Such individual does not receive any cash remuneration (other than as provided in subparagraph (b)),
- (B) Such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and
- (C) The amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals. In order to preserve the State's right to collect State unemployment taxes for which a credit against federal unemployment taxes may be taken for contributions paid into a State unemployment insurance fund, this paragraph 16 shall not apply, with respect to any individual, to service during any period for which an assessment for federal unemployment taxes is made by the Internal Revenue Service pursuant to the Federal Unemployment Tax Act which assessment becomes a final determination (as defined by section 1313 of the Internal Revenue Code of 1954 as amended).

(10) Total and partial unemployment.

a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).

2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from

such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).
 - c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph. Sums received by any individual for services performed as a member of the N. C. National Guard, as defined in G.S. 127A-3, or as a member of any reserve component of the United States Armed Forces shall not be considered in determining that individual's employment status under this subsection.
 - d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.
- (13) a. "Wages" shall include commissions and bonuses and any sums paid to an employee by an employer pursuant to an order of any court, the National Labor Relations Board, any other lawfully constituted adjudicative agency or by private agreement, consent or arbitration for loss of pay by reason of discharge and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities, including tips which an employee receives directly from a customer and reports to the employer and which the employer considers as salary for the purpose of meeting minimum wage requirements, shall be estimated and determined in accordance with rules prescribed by the Commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided further, that the term "wages" shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability, or (iv) death: Provided, further,

wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

- b. "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in section 401(a)(1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of section 401(a)(3), (4), (5) and (6) of such code and exempt from tax under section 501(a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust.
- (17) a. Repealed by Session Laws 1977, c. 727, s. 33.
b. Repealed by Session Laws 1977, c. 727, s. 33.
c. As to claims filed on or after October 1, 1974, for claimants who do not have a benefit year in progress, "benefit year" shall mean the one-year period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least five hundred sixty-five dollars and fifty cents (\$565.50), and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one hundred and fifty dollars (\$150.00). As to claims filed on or after August 1, 1981, for claimants who do not have a benefit year in progress, "benefit year" shall mean the 52 week period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. Provided, however, if the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits is either (i) the first day of a calendar quarter, or (ii) the second day of a calendar quarter followed by a February 29 within one year thereof, "benefit year" shall mean the one-year period beginning with that first day of the week with respect to which the individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least six times the average weekly insured wage, obtained in accordance with G.S. 96-8(22) and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one and one-half times the average weekly insured wage, obtained in accordance with G.S. 96-8(22).
d. Repealed by Session Laws, 1981, c. 160, s. 11.
- (24) Work, for purposes of this Chapter, means any bona fide permanent employment. For purposes of this definition, "bona fide permanent employment" is presumed to include only those employments of greater than 30 consecutive calendar days duration (regardless of whether work is performed on all those days) provided: (a) the presumption that an employment lasting 30 days or less is not bona fide permanent employment may be rebutted by a finding by the Commission, either on its own motion or upon a clear and convincing showing by an interested party that the application of the presumption would work a substantial injustice in view of the intent of this Chapter; (b)

Any decision of the Commission on the question of bona fide employment may be disturbed on judicial review only upon a finding of plain error.

- (25) Repealed by Session Laws 1981, c. 160, s. 12. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 362, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c. 476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12; 1981, c. 160, ss. 3-12; c. 774, s. 1; 1983, c. 585, s. 20; c. 625, s. 9; c. 675.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Article 37 of Chapter 160, referred to subdivision (5)p, was transferred to §§ 160A-500 to 160A-526 by Session Laws 1973, c. 426, s. 75.

Effect of Amendments. — The first 1981 amendment, in subdivision (5)j substituted "Prior to January 1, 1978" for "Notwithstanding any other provision of this Chapter, 'employer' means" at the beginning of the subdivision, added the second and third paragraphs of subdivision (5)j and deleted "'employer' means" preceding "any nonprofit" near the beginning of subdivision (5)k. The amendment deleted subdivision (5)l, which defined "institution of higher education" and "hospital," and subdivision (5)m, which defined "secondary school," added the second sentence of subdivision (5)q, inserted "because of lack of work" in the first sentence of subdivision (10)a1, and, in the last sentence of subdivision (10)a1, substituted "preceding" for "of the calendar week within which" and deleted "falls" following "date." The amendment inserted "because of lack of work" in subdivision (10)b2, added the second paragraph of subdivision (17)c, deleted subdivision (17)d which defined "benefit year" for claims filed after January 1, 1978 and deleted subdivision (25) which defined an implied contract for purposes of G.S. 96-13(a)3.

The second 1981 amendment added subdivision (6)k16.

Session Laws 1981, c. 774, s. 2 provides:

"This amendment made by Section 1 of this act shall be effective as to all services rendered after December 31, 1954; provided, however, that the amendment made by Section 1 of this act shall not apply with respect to such services performed by such individual (and the share of the catch, or proceeds therefrom received by him for such services) if and only for so long as the owner or operator of any boat treated a share of the boat's catch of fish or other aquatic animal life (or a share of the proceeds therefrom) received by an individual after December 31, 1954, and before the date of the enactment of this act for services performed by an individual after December 31, 1954, on such boat, as being subject to the unemployment tax under the Federal Unemployment Tax Act, or the Employment Security Law of North Carolina. This act shall not be construed to entitle any person to a refund."

The first 1983 amendment, effective Aug. 1, 1983, rewrote subdivision (24).

The second 1983 amendment, effective Aug. 1, 1983, inserted "of any court" and "any other lawfully constituted adjudicative agency" in the first sentence of subdivision (13)a.

The third 1983 amendment, effective Oct. 1, 1983, added the last sentence of subdivision (10)c.

CASE NOTES

I. GENERAL CONSIDERATION.

Subdivision (6)k.15 Construed. — The enactment in 1977 of subdivisions (5)q and (6)j of this section, which deleted a previous exemption from unemployment tax liability for nonprofit elementary and secondary schools, did not change the effect of the exemption in subdivision (6)k.15 of this section for persons

performing services in the employ of a church organization operated primarily for religious purposes. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

The United States Secretary of Labor was not a necessary party to an action to determine whether the unemployment tax stat-

utes applied to employees of schools operated by the Roman Catholic Church in North Carolina on the grounds that State unemployment laws must follow federal statutes in order for the State to gain a credit against the federal unemployment tax and thus obtain funds to operate State employment offices and that the United States Secretary of Labor has interpreted the federal statutes to include parochial and parish schools within the scope of the federal unemployment tax provisions, since that action in no way involved an interpretation of the Federal Unemployment Tax Act. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Applied in *Baptist Children's Homes of North Carolina, Inc. v. Employment Sec. Comm'n*, 56 N.C. App. 781, 290 S.E.2d 402 (1982).

III. "EMPLOYMENT" — EXAMPLES.

This section requires employment security contributions from church-related schools, and they are obligated to pay the appropriate taxes. *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980). But see *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Employees of schools operated by the Roman Catholic Church are exempt from the unemployment tax provisions of Chapter 96 pursuant to subdivision (6)k.15 of this section. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981). But see *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980).

§ 96-9. Contributions.

(a) Payment. —

- (1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.
- (2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

- (3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.
- (4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(d). Any election made shall be binding upon the political subdivision so electing for a period of four years.
- (5) Prior to January 1, 1978, the term "wages" shall not include for the purposes of this section any remuneration in excess of four thousand two hundred dollars (\$4,200) paid to any individual in a single calendar year by an employer with respect to employment.

For purposes of this section, the term "wages" shall not include any remuneration paid to any employee in this State in excess of the FUTA tax base paid to an individual by a single employer if the employer of that individual made contributions in another state or states upon the wages paid to such individual during the applicable calendar year, because of work performed in another state or states.

Any successor employer as defined in G.S. 96-8(5)b for the purposes of this section shall pay no contributions on that part of remuneration earned by any individual in the employ of the successor employer which, when added to the remuneration previously paid by the predecessor employer exceeded the FUTA tax base in a single calendar year, provided the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and, provided further, that the predecessor employer has paid contributions on the wages paid to such individual while in his employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

Beginning January 1, 1978, and thereafter, the taxable wage base of any employee whose wages are subject to taxation, whether totally or partially, by the State of North Carolina under any provision of this Chapter shall be the federally required tax base.

On the computation date (August 1) in 1983 and each computation date thereafter, the Commission shall compute the average yearly insured wage by multiplying the average weekly insured wage (obtained in accordance with G.S. 96-8(22)) by 52. During the calendar year following the computation date, the taxable wage base shall be the greater of the federally required tax base or the product resulting from multiplying the average yearly insured wage by sixty percent (60%), rounded to the nearest multiple of one hundred dollars (\$100.00).

(b) Rate of Contributions. —

- (1) Except as provided in subsection (d) hereof, each employer shall pay contributions with respect to employment during any calendar year prior to January 1, 1955, as required by this Chapter prior to such January 1, 1955, and each employer shall pay contributions equal to two and seven-tenths percent (2.7%) of wages paid by him during the calendar year 1955 and each year thereafter with respect to employment occurring after December 31, 1954, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

- (2) a. No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout more than thirteen consecutive calendar months ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.
- b. The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.
- c. The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to his account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year (as defined in G.S. 96-8(17)) can be established, based solely on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless his liability extends over a period of all or part of three consecutive calendar years and, as of August 1 of the third year, his credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and his predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing said rate below the standard rate for any period in which the

account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, any entity which is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, said five years to run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This paragraph shall apply to all cases arising hereunder, the question of good faith notwithstanding.

- (3)
- a. Repealed by Session Laws 1977, c. 727, s. 39.

b. Repealed by Session Laws 1977, c. 727, s. 39.

c. Repealed by Session Laws 1977, c. 727, s. 39.

d. The applicable schedule of rates for the calendar year 1972 and thereafter shall be determined by the fund ratio resulting when the total amount available for benefits in the unemployment insurance fund, as of the computation date, August 1, is divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding such computation date. Schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite such fund ratio in the table below shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable Schedule
As Much As	But Less Than	
	2.5%	A
2.5%	3.5%	B
3.5%	4.5%	C
4.5%	5.5%	D
5.5%	6.5%	E
6.5%	7.5%	F
7.5%	8.5%	G
8.5%	9.5%	H
9.5% and in excess thereof		I

Variations from the standard rate of contributions shall be determined and assigned with respect to the calendar year 1972 and thereafter, to employers whose accounts have a credit balance and who are eligible therefor according to each such employer's credit reserve ratio, and each such employer shall be assigned the contribution rate appearing in the applicable Schedule A,B,C,D,E,F,G,H, or I on the line opposite his credit reserve ratio as set forth in the Experience Rating Formula below:

EXPERIENCE RATING FORMULA

When The Credit Reserve Ratio Is:
As Much As But Less Than

Rate Schedules (%)

		A	B	C	D	E	F	G	H	I
0.8%	0.8%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5
1.0	1.0	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3
1.2	1.2	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1
1.4	1.4	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9
1.6	1.6	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7
1.8	1.8	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5
2.0	2.0	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3
2.2	2.2	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1
2.4	2.4	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9
2.6	2.6	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7
2.8	2.8	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5
3.0	3.0	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4
3.2	3.2	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3
3.4	3.4	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2
3.6	3.6	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1
3.8	3.8	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1
4.0	4.0	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1
4.2	4.2	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1
4.4	4.4	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1
4.6	4.6	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1
4.8	4.8	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1
5.0 and in excess thereof	5.0	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1

New rates shall be assigned to eligible employers effective January 1, 1972, and each January 1 thereafter in accordance with the foregoing Fund Ratio Schedule and Experience Rating Formula.

The Experience Rating Formula table in force in any particular year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

- e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING
WITH THE CALENDAR YEAR 1978

When The Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3

When The Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

- f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.
- g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31. Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.
- h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Notwithstanding any other provision of this Chapter, on the computation date in 1983 (August 1) and each computation date thereafter, if the fund ratio as computed in G.S. 96-9(b)(3)d is less than five and five-tenths percent (5.5%), the standard tax rate and the tax rate assigned to any employer by either the experience rating formula table in G.S. 96-9(b)(3)d or the rate schedule for overdrawn accounts in G.S. 96-9(b)(3)e shall be increased for the next tax year by ten percent (10%) thereof (e.g., multiplied by one and one-tenth (1.1), etc.) for each percentage point or part thereof by which five and five-tenths percent (5.5%) exceeds the fund ratio; provided that no rate shall be increased by the provisions of this subsection by more than twenty percent (20%) for 1984; by more than thirty percent (30%) for 1985 or by more than forty percent (40%) for the years after 1985.

(c) (1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. The Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all contributions which he has paid or is paid on his own behalf with respect to employment occurring subsequent to June 30, 1965. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employers bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. The amount so allocated shall be multiplied by one

hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

- b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the voluntary leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; or, (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant was hired pursuant to a job order placed with a local office of the Commission for referrals to probationary employment (with a probationary period no longer than 60 days), which job order was placed in such circumstances and which satisfies such conditions as the Commission may by regulation prescribe and only to the extent of the wages paid during such probationary employment shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding."

- c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).
- d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):
1. The benefits are paid for unemployment due directly to a major natural disaster, and
 2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
 3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.
- e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.
- (3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.
- (4) Transfer of account. —
 - a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.
 - b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned for the remainder of such year the rate

applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the United States Internal Revenue Code of 1954 which is exempt from income tax under section 501(a) of said Code.

(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

- c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1.
 - d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:
 1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
 2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
 3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.
 - e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.
- (2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.
- a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only

with respect to the first four thousand two hundred dollars (\$4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

- b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.
- c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.
- d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such

debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due.

- e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.
- (3) a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.
- b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.
- (f) (1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).
- (2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission:
 - a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,
 - b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).
- (3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.
- (4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.
- (g) Nothing contained in subsections (d) and (f) of this section shall be construed to prevent the Commission from providing any reimbursing

employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission deems such action to be in the best interest of the Commission and the affected employer(s). (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, in the second paragraph of subdivision (c)(2)b, substituted "individual" for "work" preceding "during" and added the proviso, in subdivision (d)(2)c, deleted "provided that the noncharging of benefits set forth in G.S. 96-9(c)(2)b shall not apply; provided further, irrespective of any other provisions of this Chapter, all benefits paid shall be charged to the employer's account as provided herein" preceding "and no," substituted "amounts" for "an amount," added the language beginning "and amounts" and ending "error," and deleted a second sentence which read: "Any such benefits paid and later determined to be overpayments shall be credited to the employer's account only if recovered." In subdivision (f)(4), the amendment added "except as provided in G.S. 96-9(d)(2)c."

The second 1981 amendment added the proviso to subdivision (d)(1)d.

The 1983 amendment, effective Aug. 1, 1983, added the last paragraph of subdivision (a)(5), added subdivision (b)(3)i, rewrote the first sentence of subdivision (c)(1), in subdivision (c)(2)a substituted "allocated to" for "charged against" in the first sentence and inserted the present second sentence, rewrote subdivision (c)(2)b, added the proviso at the end of the second sentence of subdivision (d)(2)a, deleted "charged" preceding "credited and maintained" in subdivision (d)(2)b, rewrote subdivision (d)(2)c, rewrote subdivision (f)(2), in subdivision (f)(4) inserted "as provided in subdivision (1) hereof," and added subsection (g).

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Application of this section to church-related schools does not violate free exercise and establishment clauses of the First Amendment to the United States

Constitution. Ascension Lutheran Church v. Employment Security Comm'n, 501 F. Supp. 843 (W.D.N.C. 1980).

§ 96-10. Collection of contributions.

(g) Upon the motion of the Commission, any employer refusing to submit any report required under this Chapter, after 10 days' written notice sent by the Commission by registered or certified mail to the employer's last known address, may be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such report is properly submitted. When an execution has been returned to the Commission unsatisfied, and the employer, after 10 days' written notice sent by the Commission by registered mail to the employer's last known address, refuses to pay the contributions covered by the execution, such employer shall upon the motion of the Commission be enjoined by any court of competent jurisdiction from hiring and continuing in employment any employees until such contributions have been paid.

There shall be added to the amount required to be shown as tax in the reports a penalty of five percent (5%) of the amount of such tax if the failure is not for more than one month with an additional five percent (5%) for each additional

month or fraction thereof during which such failure continues, not exceeding twenty-five percent (25%) of the aggregate or five dollars (\$5.00), whichever is greater.

(Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16; 1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15; 1959, c. 362, s. 9; 1965, c. 795, s. 11; 1971, c. 673, s. 21; 1973, c. 108, s. 43; c. 172, s. 4; 1977, c. 727, s. 50; 1979, c. 660, s. 16; 1981, c. 160, s. 16.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in the first sentence of the first paragraph of subsection (g), added "upon the motion of the Commission," substituted "submit any report" for "make reports," inserted "by registered or certified mail," deleted "by registered mail" following "address," substituted "by" for "from operating in violation of the provisions of this Chapter upon the complaint of the Commission, in" following "enjoined," substituted "from hiring and continuing in employment any employees" for a comma and substituted "is properly submitted" for "shall have been

made." In the second sentence of the same paragraph, the amendment inserted "by registered mail" following "Commission" and deleted "by registered mail" following "address," inserted "the" preceding "contributions," substituted "shall upon the motion of the Commission be enjoined by" for "may be enjoined from operating in violation of the provisions of this Chapter upon motion of the Commission, in" and inserted "from hiring and continuing in employment any employees."

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

CASE NOTES

Section provides adequate remedy to sue Employment Security Commission in state superior court for refund of unemployment taxes paid under protest. *Ascension Lutheran Church v. Employment Security Comm'n*, 501 F. Supp. 843 (W.D.N.C. 1980).

The trial court can properly award

prejudgment interest on protested unemployment compensation tax payments recovered in actions against the Employment Security Commission brought under this section. *Begley v. Employment Security Comm'n*, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

§ 96-12. Benefits.

- (b) (1) a. Repealed by Session Laws 1977, c. 727, s. 52.
- b. Each eligible individual whose benefit year begins on or after the first day of October, 1974, who is totally unemployed as defined by G.S. 96-8(10)a, and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate per week equal to the amount obtained by dividing such individual's high-quarter wages paid during his base period by 26, rounded to the nearest dollar, but shall not be less than fifteen dollars (\$15.00).

Each eligible individual whose benefit year begins on or after the first day of October 1983, who is totally unemployed as defined by G.S. 96-8(10), and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate equal to the amount obtained by dividing the sum of the wages paid to such individual during his two highest paid base period quarters by 52 and, if the amount so obtained is not a multiple of one dollar, rounded to the next lower whole dollar; provided that if the amount so obtained, after rounding, is less than fifteen dollars (\$15.00), no benefits shall be paid.

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, a maximum weekly benefit amount available to an eligible individual whose benefit year begins on October 1, 1974, or thereafter, shall be determined by multiplying the average weekly insured wage, obtained in accordance with G.S. 96-8(22), by two thirds rounded, if not a multiple of one dollar, to the next lower dollar. Provided, if on August 1, 1983, or any August 1 thereafter, the fund ratio as computed pursuant to G.S. 96-9(b)(3)d is less than five and five-tenths percent (5.5%), the maximum weekly benefit amount shall be computed as provided for in the preceding sentence except it shall be computed at sixty percent (60%) of the average weekly insured wage; but in no event shall the maximum weekly benefit amount be reduced by the provisions of this sentence to an amount less than the maximum weekly benefit in effect during the 12 months next preceding the computation date. The maximum rate applicable to each claimant shall be that rate in effect during the time the claimant's benefit year is established.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) Qualifying Wages for Second Benefit Year. — Any individual whose prior benefit year has expired and who files a claim for benefits on and after January 1, 1972, shall not be entitled to benefits unless he has been paid qualifying wages required by G.S. 96-12(b)(1), and since the beginning date of his last established previous benefit year and before the date upon which he files his new benefit claim has been paid wages equal to at least 10 times the weekly benefit amount of the new benefit year claim. Such wages must have been earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in Chapter 85, Title 5, United States Code.

(c) Partial Weekly Benefit. — Each eligible individual whose benefit year begins after December 31, 1977, who is "partially unemployed" or "part totally unemployed" as defined in G.S. 96-8(10)b and c respectively, and who files a valid claim, shall be paid benefits with respect to such week or weeks in an amount figured to the nearest multiple of one dollar (\$1.00) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him for such week which is in excess of ten percent (10%) of the average weekly wage in the high quarter of his base period. Each eligible individual whose benefit year begins on or after October 1, 1983, who is "partially unemployed" or "part totally unemployed" as defined in G.S. 96-8(10), and who files a valid claim, shall be paid benefits with respect to such week or weeks in an amount rounded to the nearest lower full dollar amount (if not a full dollar amount) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him for such week which is in excess of ten percent (10%) of the average weekly wage in the two highest quarters of his base period.

(d) Duration of Benefits. — On and after October 1, 1974, the maximum benefit amount available to eligible individuals shall be determined by dividing the individual's base-period wages by his high-quarter wages and multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the figure so derived by the weekly benefit amount available to that individual; provided the minimum total amount of benefits available to eligible individuals shall not be less than 13 times his weekly benefit amount, nor shall any eligible individual be entitled to more than 26 times his weekly benefit amount during any benefit year, except that such benefits may be extended further in accordance with the provisions of G.S. 96-12(e). On and after October 1, 1983, the maximum benefit amount available to eligible individuals shall be determined by dividing the

individual's base-period wages by his high-quarter wages and multiplying that quotient by eight, rounding the result to the nearest whole number, and then multiplying the figure so derived by the weekly benefit amount available to that individual; provided the minimum total amount of benefits available to eligible individuals shall not be less than 13 times his weekly benefit amount, nor shall any eligible individual be entitled to more than 26 times his weekly benefit amount during any benefit year, except that such benefits may be extended further in accordance with the provisions of G.S. 96-12(e). The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment, until such time as such wages would not be necessary for benefit purposes.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

(a) Begins the third week after a week for which there is an "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is an "off" indicator; or

(II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4, effective September 25, 1982.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5, effective September 25, 1982.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or

b. Equalled or exceeded six percent (6%).

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

- b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.
- (7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.
- (8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.
- (9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.
- (10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

- a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

- b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

- c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

- (2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

- (11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).
2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) the gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501 (C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.
3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for

extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount).

E. Total Extended Benefit Amount. —

(a) Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All State portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.

(Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1981 amendment deleted subdivision (b)(1)c, which concerned benefits for partially unemployed persons whose benefit year began on or after October 1, 1974, and subdivision (b)(3), which concerned qualifying wages for exhautees, and, in subsection (c), inserted "whose benefit year begins after December 31, 1977," deleted "either" preceding "partially," substituted "respectively, and who files a valid claim" for "in any week," inserted "benefits" following "paid," substituted "or weeks in" for "a partial benefit. Such partial benefit shall be," and substituted "ten percent (10%) of the average weekly wage in the high quarter of his base period" for "one half of his weekly benefit amount." In subsection (e), the amendment added the provisos to subdivision (e)(C)2, added subdivisions (e)(C)3 and (e)(I), substituted "taxes" for "contributions" throughout subdivision (e)(G) and, in the second paragraph of subdivision (e)(G) deleted "base period" preceding "employer who," merged two sentences into one by substituting "but the" for "All," substituted "portion" for "portions," substituted "such" for "the" preceding "extended," deleted "paid" following "benefits" near the end of the sentence and substituted "such employer" for "governmental entities or other employers not liable for FUTA taxes who are the base period employers."

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, rewrote subdivision (e)A(1); deleted former subdivisions (e)A(2) and (e)A(3), relating to national "on" and "off" indicators from January 1, 1975, through December 31, 1976; in subdivision (e)A(4), in the introductory language substituted "an 'on indicator' for this State" for "a 'State 'on' indicator' for this State," in subparagraph a substituted

"13 weeks" for "13-week period ending in each of the preceding two calendar years," and "five percent (5%)" for "four percent (4%)," and in subparagraph b substituted "six percent (6%)" for "five percent (5%)" and deleted a former last sentence making subdivision (e)A(4)a inoperative for the period between January 1, 1975 through December 31, 1976; in subdivision (e)A(5), in the introductory language, substituted "an 'off indicator'" for "a 'state 'off' indicator,'" in subparagraph a substituted "and" for "or" preceding "was less than" and "six percent (6%)" for "four percent (4%)," and deleted the former last sentence, making subdivision (e)A(5)a inoperative for the period between January 1, 1975 through December 31, 1976; in subdivision (e)A(6)a inserted "for regular compensation" following "claims"; in subdivision (e)E, inserted "(a) Except as provided in subparagraph (b) hereof," at the beginning of the first paragraph and added a second paragraph, designated (b); in subdivision (e)F1, substituted "effective in this State as a result of an 'on' indicator" for "effective in this State (or in all states) as a result of a State or a national 'on' indicator," and "an 'off' indicator" for "State and national 'off' indicators"; and in subdivision (e)I substituted "an 'off indicator'" for "a State 'off' indicator."

The first 1983 amendment, effective Aug. 1, 1983, added the second paragraph of subdivision (b)(1)b, in subdivision (b)(2) substituted "rounded, if not a multiple of one dollar, to the next lower dollar" for "rounded to the nearest dollar" in the first sentence and inserted the present second sentence, added the second sentence of subsection (c), in subsection (d) deleted the former first sentence, relating to the maximum amount of benefits payable to any eligible individual whose benefit year begins on and after March 22, 1951, and inserted the next-to-last sentence, and in subdivision (e)D inserted "rounded to the nearest lower full

dollar amount (if not a full dollar amount)" at the end of the second sentence.

The second 1983 amendment, effective Aug. 1, 1983, substituted "13-week period ending in each of the preceding two calendar years" for "13 weeks" in subdivision (e)A(4)a, and

inserted "or substantial fault" in the last sentence of subdivision (e)C 2.

Legal Periodicals. — For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

§ 96-13. Benefit eligibility conditions.

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that —

- (1) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;
- (2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);
- (3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment shall, during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, however, that no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll-week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which the equivalent of three customary full-time working days consist of a vacation period. For the purpose of this subdivision, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. For the purposes of this subdivision, no individual shall be deemed available for work during any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance, or on vacation between yearly terms of such school attendance. Except: (i) Any person who was engaged in full-time employment concurrent with his school attendance, who is otherwise eligible, shall not be denied benefits because of school enrollment and attendance. (ii) An unemployed individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall be deemed available for work. However, any unemployment insurance benefits payable with respect to any week for which a training allowance is payable pursuant to the provisions of a federal or State law, shall be reduced by the amount of such allowance which weekly benefit amount shall be rounded to the nearest lower full dollar amount (if not a full dollar amount). The Commission may approve such training course for an individual only if:

1. a. Reasonable employment opportunities for which the individual is fitted by training and experience do not exist in the locality or are severely curtailed;

- b. The training course relates to an occupation or skill for which there are expected to be reasonable opportunities for employment; and
 - c. The individual, within the judgment of the Commission, has the required qualifications and the aptitude to complete the course successfully; or,
 - 2. Such approval is required for the Commission to receive the benefits of federal law.
 - (4) No individual shall be deemed able to work under this subsection during any week for which that person is receiving or is applying for benefits under any other State or federal law based on his temporary total or permanent total disability.
 - (b) (1) The payment of benefits to any individual based on services for nonprofit organizations, hospitals, or State hospitals and State institutions of higher education, other institutions of higher education, or secondary schools and subdivisions of secondary schools subject to this Chapter shall be in the same manner and under the same conditions of the laws of this Chapter as applied to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in the educational institutions listed above, benefits shall not be payable based on such services for any week commencing during the period between two successive academic years, or during a similar period between two regular terms, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual has a contract or contracts, written, oral or implied, or a reasonable assurance to perform services in any such capacity for such educational institution for both such academic years or both such terms. Provided that if compensation is denied to any individual for any week under the foregoing sentence and such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of the foregoing sentence. The provisions of this subsection relating to the denial of benefits for any week of unemployment commencing during the period between two successive academic years or during a similar period between two regular terms shall apply to an individual who performs services on a part-time or substitute basis.
 - (2) Repealed by Session Laws 1983, c. 625, s. 5.
- (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13; 1961, c. 454, s. 19; 1965, c. 795, ss. 17, 18; 1969, c. 575, ss. 10, 11; 1971, c. 673, ss. 27, 28; 1973, c. 172, s. 6; 1975, c. 2, s. 6; c. 8, ss. 1, 2; c. 226, ss. 1, 2; 1977, c. 727, s. 53; 1979, c. 660, ss. 20, 21, 29-31; 1981, c. 160, ss. 24, 25; c. 883; 1983, c. 585, s. 17; c. 625, ss. 2-5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Paragraph 1 of subdivision (5) of § 96-8, referred to in subdivision (b)(1) of this section, was repealed by Session Laws 1981, c. 160, s. 5.

Effect of Amendments. — The first 1981 amendment deleted a proviso near the middle of the introductory paragraph of subdivision

(a)(3) which stated that secondary school employees could only be considered available for work during a vacation between academic terms only if the employee did not have a contract to perform services for both terms and, in subdivision (b)(2), substituted "or a reasonable assurance" for a comma near the end of the second sentence.

The second 1981 amendment added the last sentence of subdivision (b)(2).

The first 1983 amendment, effective Aug. 1, 1983, inserted "which weekly benefit amounts shall be rounded to the nearest lower full dollar amount (if not a full dollar amount)" in clause (ii) of the sixth sentence of subdivision (a)(3).

The second 1983 amendment, effective Aug. 1, 1983, rewrote subdivision (a)(3), added subdivision (a)(4), rewrote subdivision (b)(1), and

deleted subdivision (b)(2), relating to the payment of benefits to an individual based on services for secondary schools or subdivisions of secondary schools.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

- (2) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.
- (2A) For a period of not less than four nor more than 13 weeks beginning with the first day of the first week during which or after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct. Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) nonintentional mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above. The length of the disqualification so set by the Commission shall not be disturbed by a reviewing court except upon a finding of plain error.
- (3) For the duration of his unemployment beginning with the first day of the first week in which the disqualifying act occurs if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission. Provided further, an otherwise eligible individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall not be denied benefits because he refuses to apply for or accept suitable work during such period of training.

In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

Notwithstanding any other provisions of this Chapter, no work shall be deemed suitable and benefits shall not be denied under this Chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

- a. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
 - b. If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;
 - c. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.
- (8) For any week with respect to which he has received any sum from the employer pursuant to an order of any court, the National Labor Relations Board, any other lawfully constituted adjudicative agency, or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on such a pro rata basis as the Commission may adopt and if the amount so prorated to a particular week would, if it had been earned by the claimant during that week of unemployment, have resulted in a reduced benefit payment as provided in G.S. 96-12, the claimant shall be entitled to receive such reduced payment if the claimant was otherwise eligible.
- (9) The amount of compensation payable to an individual for any week which begins after July 2, 1977, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount rounded to the nearest dollar equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.

The amount of benefits payable to an individual for any week which begins after July 1, 1981, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by the amounts of any such pension, retirement or retired pay, annuity, or other payment contributed to in part or in total by the individual's base period employers; provided, however, that the amount of all payments received by an individual under the Social Security Act and the Railroad Retirement Act shall be deducted from the individual's benefit amount. Provided further, that all such reduced weekly benefit amounts shall be rounded to the nearest lower full dollar amount (if not a full dollar amount).

- (11) a. Notwithstanding any other provisions of this Chapter, no otherwise eligible individual shall be denied benefits for any week because he or she is in training approved under Section 236(a)(1) of the Trade Act of 1974, nor shall such individual be denied benefits by reason of leaving work to enter such training,

provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law (or any applicable Federal unemployment compensation law), relating to availability for work, active search for work, or refusal to accept work.

- b. For purposes of this subsection, the term "suitable employment" means with respect to an individual, work of a substantially equal or higher skill level than the individual's past adversely affected employment (as defined for purposes of the Trade Act of 1974), and wages for such work at not less than eighty percent (80%) of the individual's average weekly wage as determined for the purposes of the Trade Act of 1974. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7, 8; 1961, c. 454, s. 20; 1965, c. 795, s. 19; 1969, c. 575, s. 12; 1971, c. 673, s. 29; 1977, c. 26; 1981, c. 160, s. 26; c. 593; 1981 (Reg. Sess., 1982), c. 1178, s. 15; 1983, c. 585, s. 18; c. 625, ss. 6, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, added the second paragraph of subdivision (9).

The second 1981 amendment substituted "in which" for "after" and deleted "with respect to which week an individual files a claim for benefits" following "occurs" near the beginning of the first paragraph of subdivision (3).

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, added subdivision (11).

The first 1983 amendment, effective Aug. 1, 1983, added the second sentence of the second paragraph of subdivision (9).

The second 1983 amendment, effective Aug.

1, 1983, added the second sentence of subdivision (2), inserted subdivision (2A), and rewrote subdivision (8).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on unemployment compensation and the labor dispute disqualification, see 16 Wake Forest L. Rev. 472 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1040 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

For comment discussing unemployment compensation in light of *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

CASE NOTES

I. GENERAL CONSIDERATION.

The doctrine of *res judicata* is inapplicable to adjudication by unemployment compensation agencies. *Roberts v. Wake Forest Univ.*, 55 N.C. App. 430, 286 S.E.2d 120, cert. denied, 305 N.C. 586, 292 S.E.2d 571 (1982).

Applied in *Yelverton v. Kemp Furn. Indus., Inc.*, 51 N.C. App. 215, 275 S.E.2d 553 (1981).

Quoted in *Cianfarra v. N.C. Dep't of Transp.*, 56 N.C. App. 380, 289 S.E.2d 100 (1982).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Good Cause" Defined. — "Good cause" is defined as a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982).

"Good cause" is a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work. In re *Clark*, 47 N.C. App. 163, 266 S.E.2d 854 (1980).

Claimant voluntarily left work as a county social worker for good cause attributable to her employer and was thus entitled to unemployment compensation where she resigned her position because she was instructed by her supervisor to initiate custody proceedings for certain children after she had secured voluntary, revocable Board Home Agreements from the mothers to place their children in the temporary custody of others upon her assurances to the mothers that the children would be returned to the mothers upon request, and because she felt that the actions she was required to take violated the ethical standards of her profession. In re *Clark*, 47 N.C. App. 163, 266 S.E.2d 854 (1980).

Had claimant left her job because of racial discrimination practice against her by her employer, she would have had good cause attributable to her employer and so would not have been disqualified for unemployment compensation benefits. *In re Boulden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Lack of Child Care as Good Cause. — Depending on circumstances disclosed by the evidence, the lack of child care may or may not be "good cause" for an unexcused absence from work and is a matter for the factfinder to decide. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982).

Later Wish to Rescind Resignation. — Fact that claimant later wished to rescind her resignation does not negate the fact that it was voluntarily offered. *Whicker v. High Point Pub. Schools*, 56 N.C. App. 253, 287 S.E.2d 439 (1982).

III. MISCONDUCT.

The term "misconduct," etc. —

In accord with 1st paragraph in original. See *Intercraft Indus. Corp. v. Morrison*, 54 N.C. App. 475, 283 S.E.2d 555 (1981); *In re Chavis*, 55 N.C. App. 635, 286 S.E.2d 623 (1982); *Walter Kidde & Co. v. Bradshaw*, 56 N.C. App. 718, 289 S.E.2d 571 (1982).

"Misconduct," in the context of subdivision (2) of this section, is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982).

Misconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. The obvious reasons for such a rule are to prevent benefits of the statute from going to persons who cause their unemployment by such callous, wanton, and deliberate misbehavior as would reasonably justify their discharge by an employer, and to prevent the dissipation of employment funds by persons engaged in such disqualifying acts. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982); *Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.E.2d 221 (1983).

"Misconduct" may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982).

The term "misconduct" in connection with one's work is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or

disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. This definition of "misconduct" suffices to encompass an employee's violation of the employer's reasonable attendance rules, of which he has notice, and his failure to give the employer proper notice of absences for which good cause may exist. *Butler v. J.P. Stevens & Co.*, — N.C. App. —, 299 S.E.2d 672 (1983).

A discharge for "gross insolence" was a discharge for misconduct connected with the employee's work such as to disqualify the employee for unemployment compensation. *Hagan v. Peden Steel Co.*, 57 N.C. App. 363, 291 S.E.2d 308 (1982).

The use of marijuana on company property during working hours in violation of the employer's rules constitutes "misconduct connected with his work" pursuant to subdivision (2) of this section. *Hester v. Knitwear*, — N.C. App. —, 301 S.E.2d 508 (1983).

Chronic or persistent absenteeism, in the face of warnings, and without good cause may constitute willful misconduct. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982).

Absence in Violation of Work Rule. — While the mere violation of a work rule is not disqualifying misconduct where the evidence shows that the employee's actions were reasonable and were taken with good cause, deliberate violation or disregard of standards of behavior which an employer has a right to expect of his employee, or carelessness or negligence manifesting equal culpability may constitute misconduct in connection with one's employment sufficient to disqualify the employee to receive unemployment benefits. *Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.W.2d 221 (1983).

Most courts have held that persistent or chronic absences, at least where absences are without excuse or notice, and the employee has been given warnings by the employer, constitute misconduct within the meaning of the unemployment compensation laws. Obviously, when an employee is absent due to illness but fails to give proper notice the absence can amount to misconduct, not because of the illness per se but because the employee has an obligation to the employer to mitigate any damages an illness may cause the enterprise by giving appropriate notice. *Butler v. J.P. Stevens & Co.*, — N.C. App. —, 299 S.E.2d 672 (1983).

When Violation of Work Rule Not Misconduct. — A violation of a work rule is not willful misconduct if the evidence shows that the employee's actions were reasonable and were taken with good cause. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982).

An employee's alteration of production records, resulting in overpayment to the employee, constitutes willful or wanton disregard of the employer's interest, in disregard of standards of behavior which the

employer has the right to expect of the employee. *Williams v. SCM Proctor Silex*, — N.C. App. —, 299 S.E.2d 668 (1983).

Absence Due to Incarceration. — Absence from employment in violation of a work rule due to incarceration for a willful or legally unexcused probation violation amounts to "misconduct" in the context of this section. *Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), cert. denied, 307 N.C. 469, 299 S.E.2d 221 (1983).

§ 96-15. Claims for benefits.

- (b) (1) **Initial Determination.** — A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid. If the claim is determined to be not valid for any reason other than lack of base period earnings, the claim shall be referred to an Adjudicator for a decision as to the issues presented. If the claim is determined to be valid, a monetary determination shall be issued showing the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claim is not valid due to lack of earnings in his base period, the determination shall so designate. The claimant shall be allowed 10 days from the earlier of mailing or delivery of his monetary determination to him within which to protest his monetary determination and upon the filing of such protest, unless said protest be satisfactorily resolved, the claim shall be referred to the Chief Deputy Commissioner or his designee for a decision as to the issues presented. All base period employers, as well as the most recent employer of a claimant on a temporary layoff, shall be notified upon the filing of a claim which establishes a benefit year.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

- (2) **Adjudication.** — When a protest is made by the claimant to the initial or monetary determination, or a question or issue is raised or presented as to the eligibility of a claimant under G.S. 96-13, or whether any disqualification should be imposed under G.S. 96-14, or benefits denied or adjusted pursuant to G.S. 96-18, the matter shall be referred to an adjudicator. The adjudicator may consider any matter, document or statement deemed to be pertinent to the issues, including telephone conversations, and after such consideration shall render a conclusion as to the claimant's benefit entitlements. The adjudicator shall notify the claimant and all other interested parties of the conclusion reached. The conclusion of the adjudicator shall be deemed the final decision of the Commission unless within 10 days after the date

of notification or mailing of the conclusion, whichever is earlier, a written appeal is filed pursuant to such regulations as the Commission may adopt. The Commission shall be deemed an interested party for such purposes and may remove to itself or transfer to an appeals referee the proceedings involving any claim pending before an adjudicator.

(c) Appeals. — Unless an appeal from the adjudicator is withdrawn, an appeals referee shall set a hearing in which the parties are given reasonable opportunity to be heard. The appeals referee may affirm or modify the conclusion of the adjudicator or issue a new decision in which findings of fact and conclusions of law will be set out or dismiss an appeal when the appellant fails to appear at the appeals hearing to prosecute the appeal after having been duly notified of the appeals hearing. The evidence taken at the hearings before the appeals referee shall be recorded and the decision of the appeals referee shall be deemed to be the final decision of the Commission unless within 10 days after the date of notification or mailing of the decision, whichever is earlier a written appeal is filed pursuant to such regulations as the Commission may adopt. No person may be appointed as an Appeals Referee unless he possesses the minimum qualifications necessary to be a staff attorney eligible for designation by the Commission as a hearing officer under G.S. 96-4(m). Whenever an appeal is taken from a decision of the appeals referee, the appealing party shall submit a clear written statement containing the grounds for the appeal within the time allowed by law for taking the appeal, and if such timely statement is not submitted, an appeals referee may dismiss the appeal.

(f) Procedure. — The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals referee upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed.

(h) Appeal to Courts. — Any decision of the Commission in the absence of an appeal therefrom as herein provided, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the Commission as provided by this Chapter and has filed notice of appeal as hereinafter provided. The Commission shall be deemed to be a party to any judicial action involving any such decision and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose. If a notice of appeal is filed, but not in a timely fashion, the court shall dismiss the appeal upon the motion of the Commission. In order to obtain judicial review under this Chapter, the person seeking review must file a petition in the superior court of the county in which the appellant resides or has his principal place of business.

The petition shall explicitly state what exceptions are taken to the decision or procedure of the Commission and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the person seeking the review shall serve copies of the petition by personal service or by registered mail upon the Commission and upon all who were parties of record to the Commission proceedings. Names and addresses of such parties shall be furnished to the petitioner by the Commission upon request. Any party to the Commission proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

Within 45 days after receipt of the copy of the petition for review or within such additional time as the court may allow, the Commission shall transmit to the reviewing court the original or a certified copy of the entire record of the proceedings under review. With the permission of the court the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional cost as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(i) Appeal Proceedings. — The decision of the Commission shall be final, subject to judicial review as herein provided. If a timely petition for review has been filed as provided in G.S. 96-15(h), the court shall have power to make party defendant any other party which it may deem necessary or proper to a just and fair determination of the case. The Commission may, in its discretion, certify to the reviewing court questions of law involved in any decision by it. In any judicial proceeding under this section, the findings of the Commission as to the facts, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner and shall be given precedence over all civil cases. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right of appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party. No bond shall be required of the Commission upon such appeal. Upon the final determination of the case or proceeding, the Commission shall enter an order in accordance with such determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the final decision of the Commission allowed benefits.

(j) Information obtained by any employee of the Commission from an employer or the claimant with respect to a claim for benefits shall not be published or opened to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the claimant's identity or his rights to potential benefits or the amount of benefits paid except as provided below. Any individual, as well as any interested employer(s) may be supplied with information as to the individual's potential benefit rights from such claim records. Any claimant at a hearing before a claims adjudicator, or an appeals referee or the Commission or Deputy Commissioner shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. All reports, statements, information, and communications of every character with respect to a claim for benefits so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the claimant or the employer or the employer's books and records, shall be absolute privileged communications in any civil or criminal proceedings except proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any claimant or employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200.00), or imprisoned for not longer than 90 days, or both.

(Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19; 1959, c. 362, ss. 16, 17; 1961, c. 454, s. 21; 1965, c. 795, ss.

20-22; 1969, c. 575, ss. 13, 14; 1971, c. 673, ss. 30, 30.1; 1977, c. 727, s. 54; 1981, c. 160, ss. 27-32; 1983, c. 625, ss. 10-14.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in subdivision (b)(2), substituted the heading "Adjudication" for "Hearings before Adjudicator," and, in the first sentence, substituted "to the" for "his" preceding "initial," inserted "or monetary" preceding "determination," substituted "raised or presented" for "presented or raised," deleted "for benefits" preceding "under G.S. 96-13," deleted "herein" following "G.S. 96-13," substituted "should" for "shall," substituted "under" for "by virtue of" preceding "G.S. 96-14," deleted "of this Chapter" following "G.S. 96-14" and "G.S. 96-18," substituted "matter" for "claim" and deleted "who shall afford the parties an opportunity to present their positions at an informal conference" at the end of the sentence. In the second sentence of subdivision (b)(2), the amendment substituted "may" for "can," "document" for "material," and "conversations" for "inquiries when desirable," inserted "such" preceding "consideration," inserted "claimant's" preceding "benefit" and deleted "of the claimant involved" following "entitlements." The amendment substituted "all" for "any" and "parties" for "party" in the third sentence of subdivision (b)(2), substituted the fourth sentence of the subdivision for a sentence which pertained to the same subject, merged the former fifth and sixth sentences of the subdivision by substituting "for such purposes and" for "The Commission," substituted "to" for "unto" preceding "itself," deleted "it" preceding "an Appeals" and substituted "involving" for "of" in the fifth sentence and deleted a final paragraph of subdivision (b)(2) which pertained to notice on out-of-state claims. In subsection (c), the amendment added the language beginning "or dismiss" in the second sentence, deleted "of" following "notification" and inserted "whichever is earlier" in the third sentence, substituted "ultimately" for "finally" in

the former fourth sentence and substituted the last sentence for one which read "Any reference to 'appeals deputy' or 'appeals tribunal' in this Chapter shall be deemed to mean 'appeals referee.'" The amendment substituted "regulations" for "rules" in two places in the first sentence of subsection (f), substituted "referee" for "tribunal" in the second sentence of subsection (f), and, in subsection (h), inserted "whichever is earlier" in the first sentence and added the last sentence. In subsection (i), the amendment substituted the second sentence for two former sentences which pertained to the same subject matter, added the fifth sentence, substituted "from the time the appeal is perfected" for "of said notice of appeal" in the sixth sentence and substituted "them" for "it" in the eighth sentence. In subsection (j), the amendment substituted "the individual's" for "his" in the second sentence and, in the third sentence, substituted "adjudicator" for "deputy" and "referee" for "tribunal" and inserted "or Deputy Commissioner."

The 1983 amendment, effective Aug. 1, 1983, rewrote the first paragraph of subdivision (b)(1); substituted "a written appeal is filed pursuant to such regulations as the Commission may adopt" for "an appeal is initiated" at the end of the fourth sentence of subdivision (b)(2); in subsection (c) substituted "a written appeal is filed pursuant to such regulations as the Commission may adopt" for "further appeal is initiated" at the end of the third sentence and substituted the present fourth sentence for a former fourth sentence, which read "Should the appeals referee uphold the conclusion of the adjudicator, any benefits paid as the result of that decision shall not be charged to any employer's account if that decision is ultimately reversed"; and rewrote subsections (h) and (i).

Legal Periodicals. —

For comment discussing unemployment compensation in light of *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982), see 18 Wake Forest L. Rev. 921 (1982).

CASE NOTES

Scope of Superior Court's Jurisdiction.—

In accord with original. See *In re Boulden*, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

The superior court functions as an appellate court and must determine: (1) whether there was evidence before the Commission to support its findings of fact; and (2) whether the facts found sustain the conclusions of law and the resultant decision of the Commission. *Hester v.*

Knitwear, — N.C. App. —, 301 S.E.2d 508 (1983).

The scope of judicial review of appeals from decisions of the Employment Security Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. The reviewing court may not consider the evidence to find the facts itself. *Baptist Children's*

Homes of North Carolina, Inc. v. Employment Sec. Comm'n, 56 N.C. App. 781, 290 S.E.2d 402 (1982).

Conclusiveness of Findings of Fact on Appeal. —

The reviewing court under subsection (i) of this section may determine upon proper exceptions whether the facts found by the commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Findings of fact by the Commission which are supported by competent evidence in the record are conclusive on appeal. Yelverton v. Kemp Furn. Indus., Inc., 51 N.C. App. 215, 275 S.E.2d 553 (1981).

Even when findings are not supported by the evidence, where there is no exception taken to such findings they are presumed to be supported by the evidence and are binding on

appeal. Hagan v. Peden Steel Co., 57 N.C. App. 363, 291 S.E.2d 308 (1982).

Remand Where Findings of Fact Supported But Insufficient. — If the findings of fact made by the commission, even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that the commission make proper findings. In re Boulden, 47 N.C. App. 468, 267 S.E.2d 397 (1980).

Applied in In re Browning, 51 N.C. App. 161, 275 S.E.2d 520 (1981); Butler v. J.P. Stevens & Co., — N.C. App. —, 299 S.E.2d 672 (1983).

Stated in Cianfarra v. N.C. Dep't of Transp., 56 N.C. App. 380, 289 S.E.2d 100 (1982); Walter Kidde & Co. v. Bradshaw, 56 N.C. App. 718, 289 S.E.2d 571 (1982).

Cited in Intercraft Indus. Corp. v. Morrison, 54 N.C. App. 225, 283 S.E.2d 555 (1981); Williams v. SCM Proctor Silex, — N.C. App. —, 299 S.E.2d 668 (1983).

§ 96-16. Seasonal pursuits.

(e) All wages paid to a seasonal worker during his base period shall be used in determining his weekly benefit amount; provided however, that all weekly benefit amounts so determined shall be rounded to the nearest lower full dollar amount (if not a full dollar amount).

(1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14½; 1945, c. 522, s. 33; 1953, c. 401, ss. 20, 21; 1957, c. 1059, s. 14; 1959, c. 362, s. 18; 1983, c. 585, s. 19.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 amendment, effective Aug. 1, 1983, added the proviso at the end of subsection (e).

§ 96-17. Protection of rights and benefits; deductions for child support obligations.

(b) Representation. — Any claimant or employer who is a party to any proceeding before the Commission may be represented by (1) an attorney; or (2) any person who is supervised by an attorney, however, the attorney need not be present at any proceeding before the Commission.

(b1) Fees Prohibited. — No individual claiming benefits in any proceeding under this Chapter shall be charged fees of any kind by the Commission or its representative or by any court or any employee thereof.

(c) No Assignment of Benefits; Exemptions. — Except as provided in subsection (d) of this section, any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this Chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debts; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void.

(d) I. Definitions. — For the purpose of this subsection and when used herein:

- (A) "Unemployment compensation" means any compensation found by the Commission to be payable to an unemployed individual under the Employment Security Law of North Carolina (including amounts payable by the Commission pursuant to an agreement under any federal law providing for compensation, assistance or allowances with respect to unemployment) provided, that nothing in this subsection shall be construed to limit the Commission's ability to reduce or withhold benefits, otherwise payable, under authority granted elsewhere in this Chapter including but not limited to reductions for wages or earnings while unemployed and for the recovery of previous overpayments of benefits.
- (B) "Child support obligation" includes only obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act.
- (C) "State or local child support enforcement agency" means any agency of this State or a political subdivision thereof operating pursuant to a plan described in subparagraph (B) above.

II. (A) An individual filing a new claim for unemployment compensation shall, at the time of filing such claim, disclose whether the individual owes child support obligations, as defined under subparagraph I(B) of this subsection. If any such individual discloses that he or she owes child support obligations and is determined by the Commission to be eligible for payment of unemployment compensation, the Commission shall notify the State or local child support enforcement agency enforcing such obligation that such individual has been determined to be eligible for payment of unemployment compensation.

(B) Upon payment by the State or local child support enforcement agency of the processing fee provided for in paragraph IV of this subsection and beginning with any payment of unemployment compensation that, except for the provisions of this subsection, would be made to the individual during the then current benefit year and more than five working days after the receipt of the processing fee by the Commission, the Commission shall deduct and withhold from any unemployment compensation otherwise payable to an individual who owes child support obligations:

1. The amount specified by the individual to the Commission to be deducted and withheld under this paragraph if neither subparagraph 2 nor subparagraph 3 of this paragraph is applicable; or
2. The amount, if any, determined pursuant to an agreement submitted to the Commission under section 454(20)(B)(i) of the Social Security Act by the State or local child support enforcement agency, unless subparagraph 3 of this paragraph is applicable; or
3. Any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to properly served legal process, as that term is defined in section 462(e) of the Social Security Act.

(C) Any amount deducted and withheld under paragraph (B) of this subdivision shall be paid by the Employment Security Commission to the appropriate State or local child support enforcement agency.

- (D) The Department of Human Resources and the Commission are hereby authorized to enter into one or more agreements which may provide for the payment to the Commission of the processing fees referred to in subparagraph (B) and the payment to the Department of Human Resources of unemployment compensation benefits withheld, referred to in subparagraph (C), on an open account basis. Where such an agreement has been entered into, the processing fee shall be deemed to have been made and received (for the purposes of fixing the date on which the Commission will begin withholding unemployment compensation benefits) on the date a written authorization from the Department of Human Resources to charge its account is received by the Commission. Such an authorization shall apply to all processing fees then or thereafter (within the then current benefit year) chargeable with respect to any individual name in the authorization. Any agreement shall provide for the reimbursement to the Commission of any start-up costs and the cost of providing notice to the Department of Human Resources of any disclosure required by subparagraph (A). Such an agreement may dispense with the notice requirements of subparagraph (A) by providing for a suitable substitute procedure, reasonably calculated to discover those persons owing child support obligations who are eligible for unemployment compensation payments.
- III. Any amount deducted and withheld under paragraph II of this subdivision shall, for all purposes, be treated as if it were paid to the individual as unemployment compensation and then paid by such individual to the State or local child support enforcement agency in satisfaction of the individual's child support obligations.
- IV. (A) On or before April 1 of 1983 and each calendar year thereafter, the Commission shall set and forward to the Secretary of Human Resources for use in the next fiscal year, a schedule of processing fees for the withholding and payment of unemployment compensation as provided for in this subsection, which fees shall reflect its best estimate of the administrative cost to the Commission generated thereby.
- (B) At least 20 days prior to September 25, 1982, the Commission shall set and forward to the Secretary of Human Resources an interim schedule of fees which will be in effect until July 1, 1983.
- (C) The provisions of this subsection apply only if arrangements are made for reimbursement by the State or local child support agency for all administrative costs incurred by the Commission under this subsection attributable to child support obligations enforced by the agency. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150; 1979, c. 660, s. 22; 1981, c. 762, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1178, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1981 amendment rewrote subsection (b), which formerly pertained to limitation of fees, and added subsection (b1).

The 1981 (Reg. Sess., 1982) amendment, effective Sept. 25, 1982, inserted "Except as provided in subsection (d) of this section," at the beginning of subsection (c) and added subsection (d).

§ 96-18. Penalties.

(d) Repealed by Session Laws 1983, c. 625, s. 15, effective August 1, 1983.

(f) Repealed by Session Laws 1983, c. 625, s. 15, effective August 1, 1983.

(g)(1) Any person who, under subsection (e) above, has been held ineligible for benefits and who, because of those same acts or omissions has received any sum as benefits under this Chapter to which he was not entitled, shall be liable to repay any such sum to the Commission as provided in subparagraph (3) below, provided such decision under subsection (e) has been made within two years of the last such act or omission.

(2) Any person who has received any sum as benefits under this Chapter by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) or has been paid benefits to which he was not entitled for any reason (including errors on the part of any representative of the Commission) other than subparagraph (1) above shall be liable to repay such sum to the Commission as provided in subparagraph (3) below, provided no such recovery or recoupment of such sum may be initiated after three years from the last day of the year in which the overpayment occurred.

(3) The Commission may collect the overpayments provided for in this subsection by one or more of the following procedures as the Commission may, except as provided herein, in its sole discretion choose:

a. If, after due notice, any overpaid claimant shall fail to repay the sums to which he was not entitled, the amount due may be collected by civil action in the name of the Commission, and the cost of such action shall be taxed to the claimant. Civil actions brought under this section to collect overpayments shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this Chapter.

b. If any overpayment recognized by this subsection shall not be repaid within 30 days after the claimant has received notice and demand for same, and after due notice and reasonable opportunity for hearing (if a hearing on the merits of the claim has not already been had) the Commission, under the hand of its Chairman, may certify the same to the clerk of the superior court of the county in which the claimant resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such claimant has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgments, and from the date of such docketing shall constitute a preferred lien upon any property which said claimant may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied;

when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case, no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution or alias is referred to the agent of the Commission for service, the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars (\$3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of execution. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the overpayments and costs due by the claimant. Additionally, the Commission or its designated representatives in the collection of overpayments shall have the powers enumerated in G.S. 96-10(b)(2) and (3).

c. Any person who has been found by the Commission to have been overpaid under subparagraph (1) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter.

d. Any person who has been found by the Commission to have been overpaid under subparagraph (2) above shall be liable to have such sums deducted from future benefits payable to him under this Chapter in such amounts as the Commission may by regulation prescribe but no such benefit payable for any week shall be reduced by more than fifty percent (50%) of that person's weekly benefit amount. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9; 1959, c. 362, ss. 19, 20; 1965, c. 795, ss. 23, 24; 1971, c. 673, s. 31; 1977, c. 727, s. 55; 1979, c. 660, ss. 23-25; 1981, c. 160, s. 33; 1983, c. 625, s. 15.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1981 amendment, in the last sentence of subdivision (g)(2), substituted "initiated" for "effected" and "three" for "10."

The 1983 amendment, effective Aug. 1, 1983,

deleted subsection (d), relating to the receipt of benefits while conditions for such receipt were not fulfilled by reason of nondisclosure or misrepresentation of a material fact, deleted subsection (f), relating to receipt of benefits to which an individual was not entitled by virtue of an error on the part of a representative of the Commission, and rewrote subsection (g).

ARTICLE 3.

*Employment Service Division.***§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.**

CASE NOTES

Quoted in Employment Sec. Comm'n v. Lachman, 305 N.C. 492, 290 S.E.2d 616 (1982).

§ 96-29. Openings listed by State agencies.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

1983 CUMULATIVE SUPPLEMENT

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

November 1, 1983

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1983 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. Edmisten
Attorney General of North Carolina

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